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15424 ALSO IN
VOL 3120

No. 15424 *see also Vol. 3024*

United States
Court of Appeals
for the Ninth Circuit

VOL 3121

FOX WEST COAST THEATRES CORPORA-
TION, TWENTIETH CENTURY-FOX
FILM CORPORATION and LOEW'S, IN-
CORPORATED, Appellants,

vs.

PARADISE THEATRE BUILDING CORPORA-
TION, Appellee.

PARADISE THEATRE BUILDING CORPORA-
TION, Appellant,

vs.

FOX WEST COAST THEATRES CORPORA-
TION, TWENTIETH CENTURY-FOX
FILM CORPORATION and LOEW'S, IN-
CORPORATED, Appellees.

Transcript of Record

In Six Volumes

VOLUME IV.

(Pages 1425 to 1904, inclusive)

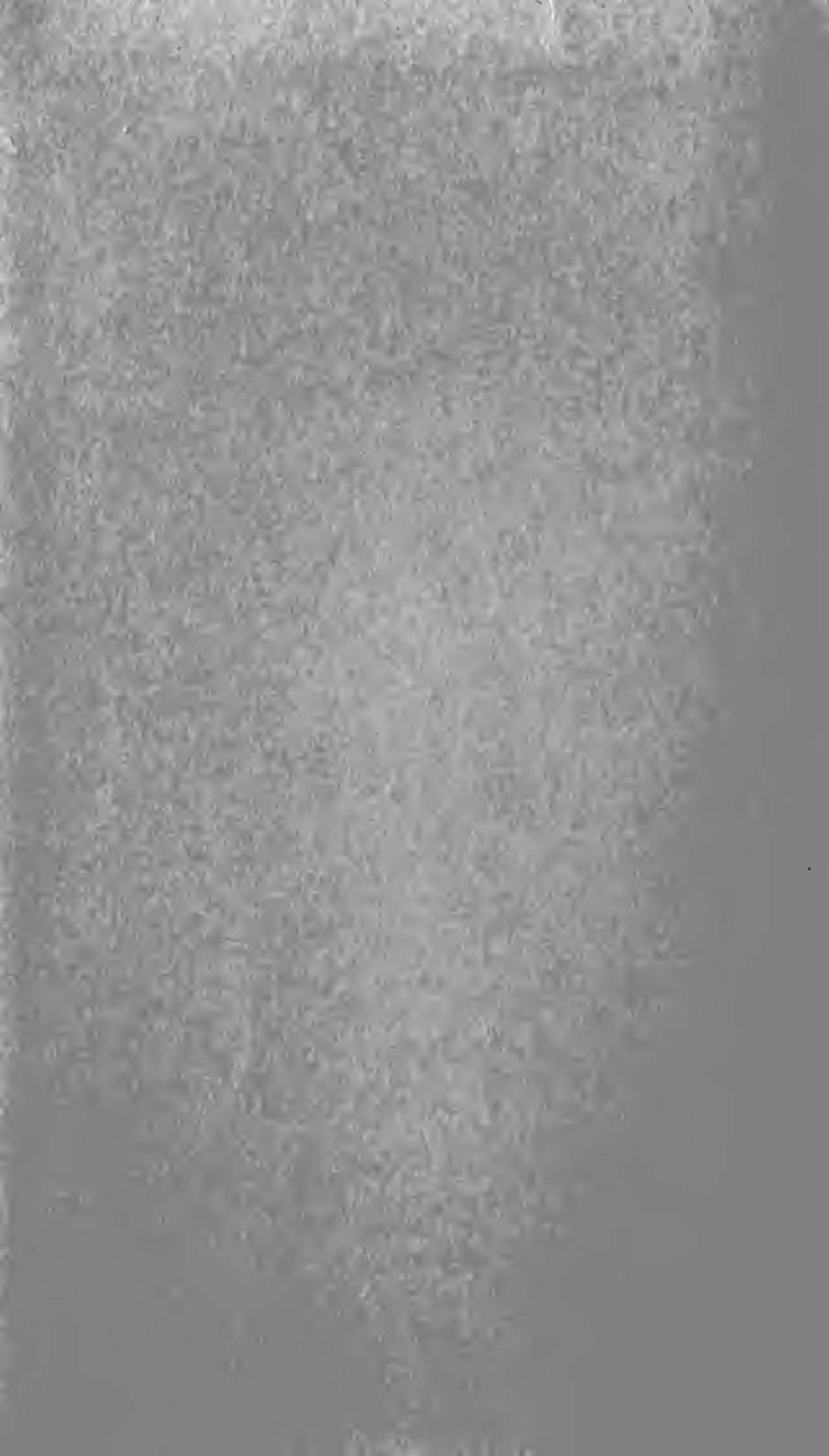
Appeals from the United States District Court for the
Southern District of California,
Central Division

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No. 15424

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(Testimony of Alex Schreiber.)

Mr. Corinblit: We will come to that in a minute. It was played on 7 days in your theatre, but we will explain the circumstances.

How about Twentieth Century-Fox, how many from Twentieth Century-Fox 7 day availability? You will stipulate to that, won't you? [1839]

Mr. Johnston: I would imagine none.

Mr. Mitchell: The product played in its own theatres.

Mr. Corinblit: How many pictures from the defendant Warner Bros. on 7 day availability? Can we have a stipulation on that?

Mr. Mitchell: Three.

Mr. Corinblit: How many on the top half from the defendant RKO?

Mr. Mitchell: I have no idea.

Mr. Corinblit: There is only one picture. It is Vendetta. It is in our schedule.

The Witness: You asked me about RKO?

Mr. Corinblit: Yes.

The Witness: I found one so far.

Mr. Corinblit: That's all. There was only one picture.

How about the defendant Universal, same period?

The Witness: One picture.

Q. (By Mr. Corinblit): From United Artists?

A. I don't find any.

Q. Finally, from Columbia, not a defendant in this case, but Columbia Pictures?

Mr. Corinblit: Could we save time and stipulate

(Testimony of Alex Schreiber.)

it is 6, subject to correction, on our play-off. I think [1840] that is correct.

Mr. Mitchell: Right.

Mr. Corinblit: That is on the top half.

Mr. Johnston: Do you propose to put down the number of pictures offered to Mr. Schreiber on the 7 day availability?

Mr. Corinblit: We will get to the terms and conditions under which they were offered, counsel. That is what this case is about.

Q. Mr. Schreiber, did you——

The Court: Now, just a minute. This totals 13 pictures, is that right?

Mr. Corinblit: 13 from all eight companies, that is correct.

The Court: You say these are the only pictures you got for the top half of the double bill during this period of time?

Mr. Corinblit: On the 7 day availability, your Honor.

The Court: On 7 day availability.

The Witness: From those companies, yes.

The Court: What did you use the rest of the time?

The Witness: Re-issues, 14 day, 21 day, 28 day, four months pictures, to keep the theatre open.

Mr. Corinblit: Yes. Now, the total for all companies, 13 for the defendants in this case—we have got 2, 5, 6.

Q. Now, turning to these six pictures that the defendants in this case played as top half of the

(Testimony of Alex Schreiber.)

bill—from the defendants in this case—turning first to RKO the picture *Vendetta*.

Mr. Mitchell: RKO is not a defendant in this case.

Mr. Corinblit: Pardon me. Turning first to Warner pictures, the first three pictures. The first picture you played was *Pretty Baby*.

Q. What was the box office quality of that picture—box office classification? A. Very poor.

Q. And turning to——

The Court: Now, just a minute. You mean to say it was very poor in your theatre, or are you speaking for the industry as a whole?

The Witness: For the industry as a whole. It was a poor picture. It would be a “C” or “D” picture.

The Court: How do you know that?

The Witness: Well, I know that very few theatres played the picture and where it did play, most of the places played it as a second picture.

The Court: Then your opinion is that this picture was a “C” or a “D” picture? [1842]

The Witness: Positively. It was no *My Blue Heaven* and it was no *Broken Arrow* and it was no *Man With a Grey Flannel Suit* and no *Guys and Dolls*. It was no *King And I* and I can go on from here until 4:00 o'clock.

Q. (By Mr. Corinblit): Now, Mr. Schreiber, the second Warner picture you played was the picture *Kiss Tomorrow Goodbye*. What was the box office classification of that picture?

(Testimony of Alex Schreiber.)

A. That would be, I would say a B picture. It was a little less than an A picture, or you may class it as an A, but not a double A or a triple A or percentage picture. It was all right. We would like to have had more of them. We couldn't get them.

Q. Now, with respect to the picture *Tea For Two*. That was also classified in the A category?

A. Yes, that is a good picture. That was an A picture and it was percentage and it played in a lot of places. We would like to have had a lot of those pictures.

Q. Now, with respect to the Paramount picture *Sunset Boulevard*, what was the box office classification?

A. Very good, and a very good picture and I put that in there as a double A or triple A or percentage picture.

Q. And with respect to the picture *Samson and Delilah* which you played—before you do that, do we have the detail on the theatres in which that picture had played the year before [1943] in Inglewood? I think there were two theatres, counsel. Do you have the detail on that?

Mr. Mitchell: No.

Mr. Corinblit: I have made some inquiry about it. Perhaps we can arrive at a stipulation.

Q. Now, how about the one picture you got from Universal which is the picture *Desert Hawk*. What was the box office classification of that picture?

A. I would say that is a little better than *Pretty Baby* and not as good as *Kiss Tomorrow Goodbye*

(Testimony of Alex Schreiber.)

and no where near the quality of Tea For Two.

Q. Now, turn for just a moment to the Warner picture that you bought, Tea For Two. The exhibit in evidence shows you paid for Tea For Two a total for one week of \$1500—Paradise rental \$1500.

Mr. Corinblit: We would like to offer in evidence, your Honor, at this time, the Joint Distributor Defendants' Exhibit D-2—Joint Plaintiff and Defendants' Exhibit D-2 and Joint Plaintiff and Defendants' Exhibit D-3. And we will substitute photostats for the copies that have been provided by counsel.

These are the cut-off cards for Warner 1949, 1950 and '51.

(Documents handed to Mr. Mitchell.)

The Court: They may be received in evidence.

The Clerk: Exhibits 57 and 58 in evidence.

(The exhibits referred to were marked Plaintiff's Exhibit 57 and Exhibit 58, and received in evidence.)

Mr. Corinblit: There are quite a number of things I want to take out of these exhibits. This may be a good time to stop for lunch.

The Court: Very well.

Ladies and gentlemen, we are about to take a recess again, and it is my duty to admonish you not to discuss this case with anyone. You are not to permit anyone to discuss it with you and you are not to formulate or express any opinion as to the rights of the parties until this case has been finally submitted to you.

With that admonition we will now recess until 2:00 o'clock this afternoon.

(Whereupon at 12:00 o'clock noon, a recess was taken until 2:00 o'clock p.m. of the same date.) [1845]

Tuesday, July 31, 1956, 2:00 o'clock

The Court: Is it stipulated the jury is present in the box?

Mr. Corinblit: So stipulated, your Honor.

Mr. Mitchell: Yes.

The Court: You may proceed.

ALEX SCHREIBER

the witness on the stand at the time of the recess, having been previously duly sworn, was examined and testified further as follows:

Redirect Examination—(Resumed)

Q. (By Mr. Corinblit): Mr. Schreiber, I will show you Exhibit 57, which has been admitted in evidence, which is the Warner's cut-off cards for the 1949-50 season, and call your attention particularly to the Academy, Fifth Avenue, or United Artists cards, having reference to first run, Inglewood, at 7 day availability.

I will ask you if you will give me the number of the release and the film rentals indicated, together with the play dates for each picture that is indicated there, starting with the first one, indicating the picture being played.

A. You mean from the very first?

(Testimony of Alex Schreiber.)

Q. Each one of these that show a picture was played in [1846] one of the Fox theatres. Do you have a release number of the first picture?

A. It doesn't——

Q. The first release number is release 911, is that right?

A. Yes, but does Ac. mean Academy here?

Q. Yes.

Mr. Mitchell: Your Honor, this is a cut-off card which is the property of Warner Bros., and the witness has probably never seen it to date.

Wouldn't it be better if you just read it, Mr. Corinblit? You understand it and I doubt if he does.

Mr. Corinblit: That would be a better way, no doubt.

The first release number played at a Fox house is release No. 911. The play date is 2/24 to 3/2/50. The film rental paid for that first week is \$1,013.79.

The second one is release 919, the play dates 4/15-4/20, and the film rental for the week \$977.78.

The next picture is 921, played 5/30 to 6/5, and the film rental \$1,675.17.

The next release number is 922, which is 6/18 to 24, and the film rental is \$1,127.90.

Finally, No. 930, 8/16 to 22/50, film rental \$1,581.80. [1847]

The Court: Now, those pictures you are talking about were played where?

Mr. Corinblit: All right, sir. The first picture was played at the Academy, the second one is at the

(Testimony of Alex Schreiber.)

Academy, and the third and fourth were at the Academy—all at the Academy.

The Court: These were Warner pictures?

Mr. Corinblit: Warner pictures, your Honor, played at the Academy, and these here are film rentals that were paid for the pictures.

Mr. Mitchell: 7 day availability.

Mr. Corinblit: 7 day availability.

For the 1950-51 season, we have the picture 005 played 10/4-11. It played at the Fox Theatre at \$1,250 flat.

The second one is 006, 10/18-24, at the Academy, and the film rental is \$1,275.52.

The next one is 007, 11/15-21, played at the Academy, and the film rental is \$1,184.70.

The release number 008, 11/1-6, Academy, for a film rental for 7 days of \$1,114.10.

Release 009, 12/20-30, at the Academy for \$3,825.

Release No. 010, 11/29-12/5, and the film rental is \$1,412.06.

Then release No. 012, which is 12/31-1/6 at the Academy, \$650. [1848]

That last may have played as a second feature.

Mr. Westbrook: I don't think there is any question about it.

Mr. Corinblit: I think this one is not appropriately in there.

027, which is 7/25-31, at the Academy, for \$934.19.

028, 7/31-8/6 at the Academy, for \$610.39.

029, 8/15-21 at the Academy, for a film rental of \$1,137.32 for a week.

(Testimony of Alex Schreiber.)

And finally 030, 9/2-8, film rental of \$1,690.03.

Mr. Mitchell: What is the last figure?

Mr. Corinblit: \$1,690.03.

Now, I will go through here, first starting back here, the ones that are over or under. The red will be those under 1,500. This one, this one, this one.

The Witness: Would you mind circling those, Mr. Corinblit. I could see them better if you circled them.

Mr. Mitchell: This is Mr. Corinblit's argument.

The Witness: I can't see them very well from up here.

The Court: I *don't* if it is necessary for you to see them.

Mr. Corinblit: We will just mark them now, Mr. Schreiber. [1849]

Q. (By Mr. Corinblit): Mr. Schreiber, after you had paid \$1500 for Tea For Two in the early fall of 1950, when you negotiated with Warner Bros. for the picture Tea For Two, after that date did Warners offer to negotiate with you for the 7 day availability? A. No.

Mr. Mitchell: You are using the word "negotiate" as distinguished from bid, aren't you?

Mr. Corinblit: Yes.

Q. Now, Mr. Mitchell in his schedule that made reference to grosses which you had on some of the—on all of the—substantially all and I think probably all, the pictures on a 7 day availability, would you tell the jury, Mr. Schreiber, from a theatre's point of view, what effect on a theatre's gross is

(Testimony of Alex Schreiber.)

realized by having an established policy in the theatre—that is with respect to either 7 days or first run as distinguished from a hit or miss policy?

A. Well, when a theatre can stay on a first run Los Angeles availability you can keep playing first run, first run, first run, first run, first run, right down the line. It can't help but be a successful theatre, if they played 7 day pictures, which is 7 days after the first run got through with the pictures, and continued on 7 days right down the line continuously for months and years. They can't help but be successful because the people form a habit [1850] of going to that theatre knowing that they will go there and see a picture. They don't have to go out of their area or into another community and look for a parking place or take the time of driving up and back from another area.

If they can see it in their own neighborhood theatre, they prefer to come to their neighborhood theatre. It is more of a service to the people in that community. And especially if they can put two "A's" or a double A and a single A or an A and B picture together. There is no question about it is going to be a successful operation.

Q. Now, what is the reverse effect? What is the effect on a theatre where you have 7 day pictures hit or miss—that is, you may have a 7 day picture on one occasion and then go a month or six weeks until you get another 7 day picture suitable for the top half?

A. That cannot be construed as a successful pol-

(Testimony of Alex Schreiber.)

icy because you just antagonize your public by bringing them into a theatre to see one picture and have to sit through an old picture or a picture they maybe have forgotten about and which they had seen elsewhere. They just leave your theatre and say, "Why come here when I have got to sit through an old picture to see the new picture when I can go somewhere else and see two new pictures on the same bill for the same amount of money. Why should I go to the Paradise Theatre or any other theatre that has a hit and miss policy." [1851]

The Court: May I ask the witness a question?

Mr. Corinblit: Yes.

The Court: Based on your 30 years' experience in the motion picture industry, do patrons go to a motion picture theatre to see a particular picture?

The Witness: Yes, sir. In the old days patrons used to come to a theatre automatically.

The Court: They don't go to a theatre just because it is a first run theatre, but they wait until they see a picture they want to see and then they go, is that right?

The Witness: That is correct. They go where the best program is.

The Court: Then what difference does it make if they go to see the picture as far as the picture is concerned? What difference does it make about the policy if they look to see what picture you are playing? They go to see the picture that they want to see.

The Witness: But they wouldn't go and see a

(Testimony of Alex Schreiber.)

program that we advertise Triple Trouble and Tea For Two—they wouldn't come to the Paradise, but they will go where Tea For Two and My Blue Heaven is playing. That is where they are going. They are going out to the movies, so they are going where there are two A pictures. It is just the same as with today's newspaper and last week's newspaper. If last week's newspaper and this week's newspaper were laying on [1852] the same table, they wouldn't pick up and read last week's newspaper. They would pick up today's newspaper and read it.

Mr. Mitchell: May I point out what that statement means as to substantial competition?

Q. (By Mr. Corinblit): Now, Mr. Schreiber, we put into evidence yesterday the profit and loss statements for the Paradise Theatre from August 1, 1950 to July 31, 1951, showing a loss after depreciation of \$35,992.76 for that period.

Mr. Corinblit: We would like to offer in evidence at this time Plaintiff's Exhibit 45-Q-1, which is the profit and loss statement of the Loyola Theatre.

These include the Loyola Theatre for the six months period ending June 30, 1951, the three months ending March 2, 1951, the nine months ending September 29, 1951, the twelve months ending December 1950, and nine months ending September 30, 1951.

Mr. Mitchell: May I object to that on the ground it is not proper redirect examination. [1853]

* * * * *

(Testimony of Alex Schreiber.)

Q. (By Mr. Corinblit): Now, Mr. Schreiber, with respect to the question of comparing theatres, and this is not with respect to the damage issue particularly, but directly to this type of chart, in licensing your pictures from distributors there has been some testimony in this record with respect to [1855] the matter of sliding scale from the point of view of paying film rental to a distributor.

Is a lower sliding scale more advantageous in licensing pictures to the distributor than a higher sliding scale?

A. The higher sliding scale is what they try to get. [1856]

The Court: You mean the distributors.

The Witness: The distributors try to get. They try to get as high percentage as they can.

The Court: Ever since you have been in the motion picture industry, it has been your experience, has it not, that the distributors try to get as much as they can for the pictures, and the exhibitors try to pay as little as they can?

The Witness: That is 100 per cent correct.

The Court: There has always been a contest, hasn't there?

The Witness: Yes, sir, there sure has.

The Court: And the successful operator, as far as the motion picture industry is concerned, the successful exhibitor is the one who can get the picture at the lowest figure?

The Witness: That's right. That is the chains.

Mr. Mitchell: I move to strike the last statement

(Testimony of Alex Schreiber.)

on the ground it is argumentative and a conclusion,
“That is the chains.”

The Court: That is what?

Mr. Mitchell: He said, “That is the chains.” He pretends——

The Court: I don’t know what he means, do you?

The Witness: The chains.

Mr. Mitchell: I know exactly what he means.

The Court: It may go out. I don’t know what he means. I don’t think the jury knows what it means, either. You have an advantage on us.

Mr. Corinblit: We will mark as Plaintiff’s Exhibit next in order a contract between Columbia Pictures Corporation and Exhibitors Service for the Paradise relating to the picture Brave Bulls.

* * * * *

We will mark this as Plaintiff’s exhibit next in order.

The Clerk: 59 for identification.

(The exhibit referred to was marked as Plaintiff’s Exhibit No. 59 for identification.)

The Court: Well, wait a minute. You have got an offer before the court. Let’s dispose of that.

Mr. Corinblit: This is the document, your Honor.

The Court: There is no objection. It will be received in evidence. I have been waiting to see if there was an objection. It may be received in evidence.

The Clerk: Exhibit 59.

(The exhibit referred to was received in evi-

(Testimony of Alex Schreiber.)

dence and marked as Plaintiff's Exhibit No. 59.)

Q. (By Mr. Corinblit): Exhibit 59 has a sliding scale which relates to this picture. It runs from 30 per cent at a 293.34 figure to 40 per cent at a 377.13 figure.

Now, we ought to have, I think, Mr. Schreiber, a little more explanation to the jury about the sliding scale. Under this agreement, it is a fact, is it not——

Mr. Mitchell: Why don't we not ask leading questions? [1859] Here we are on a company that is not even a defendant, and whatever they charge for the sliding scale must be all right, because they don't sue them, and now he is about to lead and suggest to the witness what to answer. I suggest he ask the questions properly.

Mr. Corinblit: All right.

Q. Mr. Schreiber, what film rental under the sliding scale would the Paradise pay on a gross receipt per tenth up to and including 293.34, what would be the film rental?

A. If we took in \$2,933.40, there is ten tenths to the week, and I think someone explained prior to me it is considered that Saturday is two tenths and Sunday is three tenths, and the rest of the week one tenth, because they are evening houses, and Saturday and Sunday include a matinee, and Sunday is the best day of the week.

There is ten tenths in the week. On that basis the Paradise, if they grossed and took in \$2,933.40, they

(Testimony of Alex Schreiber.)

would pay 30 per cent of \$2,933.40, and it continues. If they pay 31 per cent of——

The next figure would be \$2,933.40. Then you add to that 293.34 to the 2,933. Each day you add one more point from 30 to 40—not each day. Each point goes up a separate figure.

Now, based on that figure, when Mr. Zabel was up here, I think he said when they started at 20 per cent, they [1860] figured a profit in there and the higher percentage they go the more profit they made.

We start at 30 per cent. On the same comparison, the Academy Theatre or the Fox theatres or the United Artists Theatre Circuit took in \$2,933, they would only pay 20 per cent of that, which would be about \$586.

If the Paradise took in \$2,933, the Paradise would pay 780 or practically \$800 for the same picture that the Fox theatre group and the United Artists theatre group would have paid \$580 for. That goes right down the line.

When the Paradise would pay 40 per cent, if they would take in \$3,771, then they would be required to pay 40 per cent of \$3,771, which is roughly over \$1,400. The Paradise would pay over \$1400.

But if the United Artists Theatre or the Fox Theatre or their group buys that on the 20-40, which was their standard policy, buying policy——

Mr. Mitchell: I object to that, which was their standard policy. This witness is rolling on and on

(Testimony of Alex Schreiber.)

and arguing a matter that is way beyond his knowledge, your Honor.

The Court: I think this is argument.

Mr. Mitchell: I move to strike it out.

The Court: I don't know where the witness has the right to comment upon the testimony of another witness.

Mr. Corinblit: I agree, your Honor. [1861]

The Court: I think the whole answer should go out. [1862]

* * * * *

Mr. Corinblit: We will mark the plaintiff's exhibit next in order. [1865] I think these ought to be numbered A. What is the next number?

The Clerk: 60.

Mr. Corinblit: 60-A is a contract, Fox West Coast on behalf of the Loyola Theatre and Paramount, for the picture Captain China, dated February 16, 1950.

The Court: It may be marked.

Mr. Corinblit: This is for identification only at this time, your Honor.

The Court: It may be marked for identification.

The Clerk: 60-A.

(The exhibit referred to was marked Plaintiff's Exhibit 60-A for identification.)

Mr. Corinblit: And 60-B, the deal sheet showing the contract between Fox West Coast Agency and Universal for the picture A Woman's Vengeance, which is dated March 5, 1948.

The Clerk: 60-B.

(Testimony of Alex Schreiber.)

(The exhibit referred to was marked Plaintiff's Exhibit 60-B for identification.)

Mr. Corinblit: And as 60-C the contract between Fox West Coast on behalf of the Loyola Theatre and Paramount with respect to the picture *Golden Earrings*, dated 12/23/47.

(The exhibit referred to was marked Plaintiff's Exhibit 60-C for identification.)

Mr. Corinblit: I will mark next the deal sheet with respect to the picture of Warner Bros., *The Last Fling*, having [1866] reference to the Loew's State, Chinese, Uptown and Loyola Theatres, dated June 21, 1949.

The Clerk: 60-D for identification.

(The exhibit referred to was marked Plaintiff's Exhibit 60-D for identification.)

Mr. Corinblit: 60-E, a contract of Fox West Coast on behalf of the Grauman's Chinese, Loew's State—I beg your pardon—on behalf of the Loyola Theatre only for the pictures *Two Smart People* and *Cockeyed Miracle*, dated November 25, 1946.

The Clerk: 60-E for identification.

(The exhibit referred to was marked Plaintiff's Exhibit 60-E for identification.)

Mr. Corinblit: And finally, as 60-F, the deal sheet for Warner's picture *House Across the Street*, for the Loew's State, Chinese, Uptown and Loyola Theatres, dated July 29, 1949.

Mr. Mitchell: May we see those?

Mr. Corinblit: Yes, certainly.

(Testimony of Alex Schreiber.)

I will offer in evidence the Plaintiff's Exhibit 60-A, the first one. [1867]

Mr. Mitchell: I object to this, your Honor, upon two grounds.

The Court: There is no question so far. You asked to look at them.

Mr. Mitchell: I thought he had offered them.

Mr. Corinblit: I do offer the exhibit at this time.

Mr. Mitchell: I thought I understood him to say he offered it, your Honor, and in response to that I want to object to it, first, upon the ground it is a first run contract. It has no reference to the problem that we are talking about here of sliding scale for 7 day pictures.

In the second place it is long before the Paradise opened, namely, on February 16, 1950. And what kind of a contract Paramount made with the Loyola in any respect of Captain China to play February 16, 1950, is immaterial. It gets into another confusing issue, your Honor. [1868]

* * * * *

The Court: I am going to sustain the objection.

Mr. Corinblit: All right, your Honor.

Q. Now, Mr. Schreiber, Mr. Johnston asked you some questions about your meeting with Mr. Decker and Mr. Epstein. Who was the first person to approach you in connection with the Joe Schenck transaction? Who was the first person that contacted you?

A. Mr. Sam Decker told me that—

(Testimony of Alex Schreiber.)

The Court: He didn't ask for the conversation. He asked for the name of the person who first approached you.

The Witness: Mr. Sam Decker.

Q. (By Mr. Corinblit): And subsequently Mr. Decker introduced you to whom?

A. To Irv Epstein of Fox West Coast Theatres.

Q. And Mr. Epstein, as you have already testified, told you that Mr. Schenck had asked him to contact you, is that correct?

A. He told me he had one of the ten biggest men in the industry that wanted to buy a half interest in the Paradise Theatre.

Q. Did you at any time—first, let us talk about 1949. Did you make overtures to Mr. Schenck?

A. No, never.

Q. All right. You responded to overtures made by them, is that correct? [1872]

A. By the appointment—

Mr. Johnston: I object to that as calling for a conclusion of the witness.

The Court: It is a conclusion. I think the objection is good. We have gone into this once before.

Mr. Corinblit: Well, your Honor, Mr. Johnston went into it on cross examination, and I wanted to straighten out a couple of matters. I will withdraw the question.

Q. Mr. Schreiber, with respect to the question as to who was to obtain an interest in the Paradise Theatre, relating to the Schenck transaction, in the

(Testimony of Alex Schreiber.)

first contact with you, will you indicate what was the percentage of interest that was requested—what was the percentage of interest that was requested?

A. Fifth per cent.

Mr. Johnston: I object to that as having all been gone into. It has been asked and answered.

The Court: Objection sustained. There wasn't anything gone into concerning that figure as far as cross examination was concerned.

Mr. Corinblit: All right, your Honor.

The Court: The only question raised as I remember, was whether or not Mr. Schreiber had employed certain people as agents or brokers.

Mr. Corinblit: All right, your Honor. There was one [1873] other matter, your Honor, which I would like to clear up.

Q. How long after the meeting of March 1949 did you decide in your own mind to proceed with the Paradise Theatre alone?

A. I waited from the time I went back to Detroit in about the middle of April, for maybe a few months, and during that few months Mr. Epstein, I believe, called me on the telephone or called me—or I called him on the telephone or he wrote me a letter or I wrote him a letter and he sent me a wire telling me that he thought his people were going to meet me in New York or Florida or back in California.

And he told me, I believe, on the telephone or mail or wire that Mr. Schenck was in a meeting

(Testimony of Alex Schreiber.)

in Miami or New York with Mr. Skouras. I believe it was in the trade papers——

Mr. Johnston: I am going to move to strike this answer as being not responsive and also conclusions and speculations of the witness.

The Court: Objection sustained.

Mr. Johnston: He said “either that or I or” something else.

The Court: Objection sustained.

Mr. Corinblit: Does your Honor in sustaining the objection just strike the latter portion of the answer? [1874]

Mr. Johnston: I move to strike everything after “a few months.”

The Court: Now, he has gone into the trade papers. That is not responsive.

You can answer the question: Was it three months, five months or five years? You can answer that.

The Witness: I would say within two to six months—wait a minute. That would be 1950—no, 1949. We broke ground in October——

The Court: We just want the time.

Q. (By Mr. Corinblit): How long after the conversation of March 15, 1949, when you came back from the vacation in early April, was the first time after that time that you finally decided to go ahead on your own?

A. I believe within 60 days to 90 days I decided to go ahead with the building of the theatre.

(Testimony of Alex Schreiber.)

Q. Now, did you have a conversation with Mr. Epstein on the telephone concerning the prior negotiations you had with Mr. Schenck?

A. Yes, I believe I did.

Mr. Johnston: Just a minute. I object to that as leading and not proper redirect examination. I didn't go into any phase of that.

The Court: Objection sustained. That wasn't gone into. And the witness already has testified to that. [1875]

Mr. Corinblit: All right, your Honor.

Q. Now, with respect to the questions that were asked by Mr. Johnston having to do with Mr. Toplikar, Mr. Johnston read into evidence a letter. Would you tell the court and the jury what arrangements Mr. Toplikar made with you with respect to these two advertisements that Mr. Johnston referred to in his letter?

Mr. Johnston: I didn't refer to them. Mr. Schreiber did in his letter.

The Court: Well, the letter said something about the advertisements.

Mr. Johnston: That is right. It wasn't something I referred to. Mr. Schreiber wrote the letter. I didn't write the letter.

Mr. Corinblit: You read it.

The Court: The objection is overruled. Go ahead.

Will you read the question, Mr. Reporter.

(Question read.)

(Testimony of Alex Schreiber.)

The Witness: When I was getting ready to leave Detroit Mr. Toplikar was very broken-hearted because of the fact that I didn't—

The Court: Nobody asked you whether he was broken-hearted or not. That is not material. I don't know. He may have died of a broken heart, but that isn't what you were asked. Read the question to the witness, Mr. Reporter. [1876]

(Question read.)

The Court: Do you understand that?

The Witness: I think I do.

The Court: There was nothing said about health in the question. Now, see if you can answer the question.

The Witness: Mr. Toplikar knew I was going back to Detroit and he wanted to know if I had any deals or any property or anything he could sell for me or he could develop for me while I was in Detroit. I told Mr. Toplikar that the mortgage company have turned me down for mortgages on the Valley Plaza and Valley Village Theatres and if he wanted to handle the sale of those two lots and earn himself a commission, I would pay for the advertising to advertise the lots for sale and use his name so people could inquire from him, and if he could make a deal on the lots that would be another way he could earn a commission.

The Court: That had nothing to do with the Paradise Theatre?

The Witness: No, it did not.

(Testimony of Alex Schreiber.)

The Court: It only had to do with the situations in the Valley?

The Witness: He wanted some listings of property.

The Court: Wait a minute. I didn't ask that. It only had to do with the situations in the Valley. You can answer that "Yes" or "No." [1877]

The Witness: Yes, sir.

Mr. Corinblit: Your Honor, there is a new subject that I want to go into and this might be a good breaking off point.

The Court: Ladies and gentlemen, we are about to take another recess and again it is my duty to admonish you that you are not to discuss this case with anyone, you are not to permit anyone to discuss it with you, and you are not to formulate or express any opinion as to the rights of the parties in this case until it has finally been submitted to you.

With that admonition we will now recess until 10 minutes after 3:00.

(Short recess.) [1878]

The Court: Stipulate the jury is present in the box?

Mr. Corinblit: So stipulated, your Honor.

The Court: You may proceed.

Mr. Corinblit: I might say, your Honor, the estimate I made last Friday of when we expect to close our case has been moved up. I think we will

(Testimony of Alex Schreiber.)

probably close our case by tomorrow afternoon, and I have so informed counsel.

With respect to the exhibits, your Honor, that we have marked, I would like to offer in evidence, and first mark as Plaintiff's exhibit next in order the 7 day chart, which will be Exhibit 61. I will offer that in evidence.

The Court: In evidence.

The Clerk: Exhibit 61.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit No. 61.)

Mr. Corinblit: As Exhibit 62, the chart showing the total number of top half pictures played in the Paradise on 7 day availability.

The Court: In evidence.

The Clerk: Exhibit 62.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit No. 62.)

Mr. Corinblit: And as Exhibit 63, the film rental comparison with other 7 day exhibitions of Warner pictures. [1879]

The Court: In evidence.

The Clerk: Exhibit 63.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit No. 63.)

Mr. Corinblit: Next, the parties have stipulated with respect to 4 pictures on the play-off of the

(Testimony of Alex Schreiber.)

Paradise Theatre. With respect to the Metro pictures Lady Without A Passport, Summer Stock, Happy Years, Three Little Words, and Nancy Goes To Rio, the stipulation is that those pictures be designated as spot booking on the Paradise chart. Is that correct?

Mr. Mitchell: That is right.

Mr. Corinblit: The next matter, your Honor, is a matter we reserved, and I am going into it on direct as distinguished from redirect, unless they want to recross on the other issues at this point.

Mr. Mitchell: Your Honor, there is only one point I would like to go to into on recross up to this point, and that is in view of the implications of the jurors on the piece of paper, I would like to read into evidence Plaintiff's Exhibit No. 45-J, which is the Loyola play-off giving the dates, the pictures, the distributor, and the availability.

Mr. Corinblit: Are you talking about the Loyola play-off, Mr. Mitchell.

Mr. Mitchell: The Paradise play-off.

The Court: You want to read it into evidence?

Mr. Mitchell: Yes.

The Court: All right. I don't care. You can do it now.

Mr. Mitchell: As far as I am concerned, there isn't any other redirect on the matters you have touched on.

Mr. Johnston: I have no further cross examination as the record now stands.

(Testimony of Alex Schreiber.)

The Court: All right. You can read that into the record.

Mr. Mitchell: If I may, to indicate the Paradise Theatre play-off. [1881]

* * * * *

Mr. Corinblit: On Exhibit 45-J the picture Up Front is corrected now to read 14 days instead of 7 days.

Mr. Mitchell: That is correct.

Mr. Corinblit: On Exhibit 45-J, the picture Lady Without A Passport is now corrected to read "spot booking."

Mr. Mitchell: That is right.

Mr. Corinblit: The picture Summer Stock and Happy Years I am adding the words "spot booking."

Mr. Mitchell: That is correct.

Mr. Corinblit: And the picture Three Little Words and Nancy Goes To Rio, spot booking.

Mr. Mitchell: That is correct.

Mr. Corinblit: I have inserted those entries on Exhibit 45-J.

Mr. Mitchell: Yes.

Mr. Corinblit: This is on direct examination, your Honor.

Mr. Mitchell: This is, just so we understand each other, this is a new subject you are opening up?

Mr. Corinblit: Yes.

Mr. Mitchell: And subject to cross examination?

(Testimony of Alex Schreiber.)

Mr. Corinblit: Yes. This is a direct matter that we held in abeyance.

Q. Mr. Schreiber, in about November, 1950, did you cause to be carried out a survey using questionnaire cards [1888] to people living in the Westchester area?

A. I didn't do it myself, but I had it done.

Q. I will show you as an exemplar a card which is headed "Paradise Theatre Survey, November 1950," and ask you whether this is the card which you used with respect to that survey?

A. That is correct.

Q. Now, with respect to the entries on the card, who drafted the entries—that is, who drafted the question? A. I did.

Q. Now, will you tell us what procedure you followed with respect to obtaining answers on the cards—that is, how was that handled?

A. I had the cards made up. Then I had my manager call the Loyola College and ask the dean at the Loyola College if he had some boys or girls who wanted to make some spare money after school hours or on Saturdays and Sundays; that I had a questionnaire that I wanted these students to go to house-to-house during the day time, not in the evening and fill in these questionnaires.

We wanted to know where the people of the Westchester area were going to see movies.

The next day or two they sent me about 4 or 5 boys, and I believe two girls, and I had these blank

(Testimony of Alex Schreiber.)

cards, and I explained to them what I would like to have them do by going [1889] house-to-house ringing the doorbells or knocking on the door, and explain to the occupant of the house that they were sent out by the management of the Paradise Theatre and that they had a little questionnaire they would like to have filled out and would they be kind enough to answer the questions, sign their names so that would be an indication that they personally filled out the cards, rather than have the boy or girl do it on their own accord which would make it more authentic, and at the same time when they filled out the questionnaire they were instructed to leave a free pass good for one or two, I don't remember, with the occupant of the house and invite them, if they hadn't been to the Paradise, that the complimentary ticket would admit them to the theatre to see what we thought we one of the finest theatres in Southern California. These boys and girls went out into the various areas that I believed are designated on a map that I had hanging on my office wall, a map that was furnished to me by Mr. Worthington of the Ayers office, and I just picked at random, and I said, "You take this section," and the next fellow I said, "You take this section," and the girl, "You take this section," and the other fellow, "You take this section," and another one, "You take this section."

We agreed on, I think, 65 cents an hour or 65 cents for three cards or four cards, or something.

(Testimony of Alex Schreiber.)

We figured about how long it would take them to answer a card or we may have made [1890] a deal on so much a card. I don't remember that.

They went out and the first night they brought the cards in and the second night they brought the cards in, and maybe the fifth day they brought cards in and after the second or third time I noticed that the girl, one of the girls was very good in knowing what we wanted, and the fellows were kind of dropping out. They didn't like the job.

I turned over the balance of the cards to the girls, one of the girls, and told her to try and get the rest of the cards filled out with other boys or other girls, and after we had I think about 600 cards filled out, we stopped.

Q. All right. As an exemplar I would like to read just the questions contained on the card to the jury at this time if that is agreeable.

The card is headed "Paradise Theatre Survey, November 1950."

The first question "Have you been to the Paradise?"

And then there is a space marked "Yes" and a space marked "No" and following that "Any suggestions".

Secondly, "What theatre do you attend" and then here is a space and then there is a question "Drive-in" and then a space for the answer either yes or no.

Then the third question, "Do you go to the

(Testimony of Alex Schreiber.)

movies” and then there is a space for the answer yes. And then “How often” and a space and then the word “No,” and a space, [1891] and the word “Why”.

Then the fourth question was, “What type of picture do you like? “Drama” and then a space, “Comedy” and a space. “Westerns” and a space, and “Musicals” and a space. Below that is “Mysteries” and a space and following that “Suspense” and a space.

The next question is, “Do you prefer single” and a space “or double bills” with a space.

Then the next question “Do you prefer early run pictures with higher admissions” followed by a space.

“Do you prefer pictures a couple of weeks later, two good pictures same bill with lower admissions” followed by a space.

Then, “Do you like shows special for children” and then a space for “Yes” or “No” or “Matinee”.

“What newspapers or medium used to go to the movies” followed by a space.

“Westchester Airport Tribune——

“Westchester News Advertiser——

“Inglewood —— Culver City —— Theatre Trailor and Lobby display ——”

“Have you a television set” followed by a space for “Yes” or “No.” And “Do you plan to buy one” followed by a space.

“Do you know about our telesonic hearing aids” with a blank space for the answer. [1892]

(Testimony of Alex Schreiber.)

“Do you know about our 1300 push back seats” and a space.

“Do you know about our cry room for small children” followed by a space.

“Do you know about our free parking lot, lighted and paved” and a space for the answer.

“Would you like to receive Preview Notices and other information by mail” and there is a space for a “Yes” or “No” answer.

“Do you drive to the theatre or walk” and there are spaces for answers.

And then the card is signed with the address.

We will offer just for identification as plaintiff’s next in order a chart—a schedule showing a summary of the Paradise cards, with respect to the particular questions and I will describe the question.

The Court: That may be marked for identification only.

The Clerk: 64 for identification.

(The document referred to was marked Plaintiff’s Exhibit 64, for identification.)

Q. (By Mr. Corinblit): Mr. Schreiber, I will show you—let me state for the record that we have all the cards, we believe all the cards here, and they have been made available to counsel for the defendants.

Mr. Schreiber, I will show you Plaintiff’s Exhibit 64, [1893] page 1, and call your attention to the fact that the reference shows “Paradise Cards: Question (1)” “What Theatre do you Attend?” and on the left hand side there are answers and on

(Testimony of Alex Schreiber.)

the right hand side are the total number of answers.

Was this chart prepared—was this schedule, summary of the cards prepared under your supervision? A. It was.

Q. All right. Now, the entries under the question: "What Theatre Do You Attend" are the literal entries taken right off the card, is that right?

A. That is correct.

Q. And the total number under the "Total number answers" is the totals—are the totals, is that correct? A. That is correct.

Q. Now, sometimes on the cards someone would enter a reference to two or more theatres and that fact is indicated by the asterisks on the first page and the summary of these two or more answers contained on the second page, is that correct?

A. That is correct.

Q. Now, the second question that we have summarized here is the question: "What Theatre Do You Attend? Drive In?" is that right?

A. That is correct.

Q. And the totals opposite the answers indicate the [1894] totals—indicate the total of answers which relate to the particular question, is that correct? A. That is correct.

Q. And the third question that we have summarized is the question: "Have You Been to the Paradise" and then we have the total answers opposite "Yes" and the total answers opposite "No," is that correct? A. That is correct.

(Testimony of Alex Schreiber.)

Q. Finally the question we have summarized under two headings, A and B is: "Do you prefer early run pictures with higher admissions?"

"Do you prefer pictures a couple of weeks later, two good pictures same bill with lower admissions," and the totals there are the totals which refer to the questions, is that correct? A. That is right.

Mr. Corinblit: Your Honor, we will offer Plaintiff's Exhibit 64 in evidence.

The Court: In evidence.

(The document heretofore marked Plaintiff's

Exhibit 64 was received in evidence.) [1895]

* * * * *

Mr. Mitchell: The whole thing is unintelligible, but the letter "L" means Loyola and the "L.T." means La Tijera, I suppose the letter "P" means Paradise?

Mr. Corinblit: I will agree with that. The chances are that that is what it means. We are just looking at the cards as we have them. [1898]

* * * * *

Q. Turning to the question, the first question, Mr. Schreiber——

The Court: Is that *you are all* going to read of that survey?

Mr. Corinblit: Yes, sir.

Now, with respect to the other, Mr. Westbrook had suggested a possible stipulation with regard to one other question, also, on two. If you will give me the total, I think we will stipulate to them subject to our final check.

(Testimony of Alex Schreiber.)

Mr. Mitchell: We would like to have you stipulate these cards show that 489 out of 579 said that they used automobiles to attend the theatre.

Mr. Corinblit: We will so stipulate, subject to a final check.

Mr. Mitchell: Out of 726 answers, a total of 17 said that they used the Inglewood newspapers to select motion pictures.

Mr. Corinblit: We will stipulate to that, subject to a final check.

Mr. Mitchell: Those are the only two other overall figures. We have some breakdown we want to talk about. [1902]

Q. (By Mr. Corinblit): Mr. Schreiber, I think you have stated that in August early 1950, it was your opinion the Paradise was not in substantial competition with the Academy Theatre in Inglewood. Calling your attention to the answers on this survey card, on the survey list, Plaintiff's Exhibit 64, with respect to identification of the Academy Theatre, was your opinion the same after that survey as it was before?

The Court: You can answer that yes or no.

The Witness: Yes.

Q. (By Mr. Corinblit): Calling your attention to your opinion that you testified to in August, that in your opinion the—incidentally, the number of people that mentioned the Academy by name is 7.

Mr. Mitchell: We have had that once. Do we have to go over and over it again?

The Court: It is necessary to do it to impress

(Testimony of Alex Schreiber.)

it upon the jury, by repeating it. The objection is sustained.

Mr. Corinblit: I didn't mean to do that, your Honor.

Q. Mr. Schreiber, you had an opinion prior to the opening of the theatre in August that your Paradise Theatre was not in substantial competition with the Fifth Avenue Theatre. Do you find any reference to the Fifth Avenue Theatre on this list at all?

Mr. Corinblit: I think we can stipulate there was [1903] no specific mention of the Fifth Avenue Theatre, can we not?

The Court: May I ask this witness a question?

Mr. Corinblit: Yes, sir.

The Court: Have you had any reason to change your opinion that you have heretofore expressed relative to substantial competition after you made this survey?

The Witness: No, sir. I still was of the same opinion.

The Court: All right.

Q. (By Mr. Corinblit): Now, turning to the fourth question: "Do you prefer early run pictures with higher admissions?" And the section, "B. Do you prefer pictures a couple of weeks later, two good pictures same bill with lower admissions?" Did you draft that question, Mr. Schreiber?

A. Yes, I did.

Q. Do you know why in the world anyone can answer no to that question?

(Testimony of Alex Schreiber.)

Mr. Mitchell: That is argumentative, your Honor.

The Court: He certainly is not going to draft a question and get the people to answer and then try to explain their answer away.

Mr. Corinblit: No, sir.

Q. Mr. Schreiber, I think you testified——

The Court: I think we can all stipulate a great majority of those who go to the picture shows think they pay [1904] too much.

Mr. Corinblit: There are just two other questions.

Q. You testified that shortly after this survey began, you caused it to be terminated, that is, you stopped it? A. That's right.

Q. What was the occasion for that termination of the survey?

A. First of all, after looking through these cards several nights until maybe 2:00 o'clock in the morning, trying to figure out what they would indicate, in addition to the fact that these theatres were not in substantial competition, we were convinced they weren't by the cards we looked at, and then by looking over some of the other answers, when we came to the question about earlier pictures with higher admissions, and two good pictures on the same bill with lower admission, some friend of mine, or my son or somebody said to me, "You got conflicting questions there. You don't say in there, Do you prefer first run pictures with higher admissions? You just say earlier pictures, and you are running 21

(Testimony of Alex Schreiber.)

and 14 and 7 day pictures. Did you mean first run pictures, or did you mean earlier, 21, 14? Did you mean the 14 to 7? Did you mean the 7 to first? What did you mean?"

So there was a conflict.

The Court: You understood the question when you drafted it, didn't you? [1905]

The Witness: I did. That is where I made the slip.

Then the next question about Do you prefer pictures a couple of weeks later, two good pictures same bill with lower admissions, I didn't say lower admission at 35 cents, 40 cents, 25 cents, 50 cents. I just said lower admission. There was a lot of theatres at that time charging 30 cents, 35 cents, 40 cents. I didn't say, Do you prefer a picture like Guys and Dolls or Lieutenant Wore Skirts, which is showing over on Beverly Drive last week, or The Searchers, Meet Me in Las Vegas on the same program, plus a give-away of a thousand dollars on Tuesday night. I didn't ask that question, if they wanted to see that kind of picture with cheaper prices, although the public might have had that in mind, that that was the two type of pictures they would like to see for maybe 35 or 40 cents.

So when it was pointed out to me that there were conflicting answers, I said, "I have had enough."

Mr. Mitchell: You can see, your Honor, that the witness when he was asking me questions all the time had been practicing a long time.

The Witness: I was what?

(Testimony of Alex Schreiber.)

Mr. Corinblit: No further questions. [1906]

* * * * *

Recross Examination

Q. (By Mr. Mitchell): Mr. Schreiber, you had never taken an audience survey before, had you?

A. An audience survey?

Q. Well, under your supervision you conducted a survey of the desires—as to the desires of people in the Westchester area. Had you taken that kind of survey before?

A. Personally I stood at the door many evenings when [1911] we first opened, and inquired from people where they came from. A lot of people——

Q. All right. I am trying to find out if you had ever conducted a survey like this, having people go from door to door or make some sort of survey?

A. Just the one I spoke about yesterday.

Q. You don't claim to be an expert on surveys, do you? A. Myself?

Q. Yes. A. No, I am no expert.

Q. You really didn't ask any question or questions designed to find out whether people in Westchester, if a picture were playing exclusively in one theatre in Inglewood on a 7 day run, whether the people in Westchester would go to that theatre, did you?

Mr. Corinblit: I object to that question as calling for a conclusion and speculation.

The Court: I think it is. The objection is sustained.

(Testimony of Alex Schreiber.)

Q. (By Mr. Mitchell): With respect to the questions that you did ask, Mr. Schreiber, I would like to, so that they will make some intelligent showing by grouping, I would like to go over them with you by groups. May I have the exhibit?

Since there is so much detail, I think the only way I can do it, your Honor, is to stand by him here and I will ask, [1912] since we are going to accumulate some of these out of this tremendous mass in the several groups, I will ask Mr. Westbrook to use our paper on the blackboard.

Do you have a title for what we are going to try to do here? Paradise survey is what we agreed on.

Now, in these cards here there are certain of the people that didn't answer this question at all:

"What theatre do you attend" and I would like to indicate by circling those figures so that we will leave those out of consideration.

For instance, some of them, 73 of them answered "None," correct?

A. Answered they didn't go to any theatre. That was our interpretation of that.

Q. So I will circle that "73" and then five of them said—perhaps if we get a piece of paper—then we have five "None very often?"

A. That is correct.

Q. Which we will circle and then we have got—

A. What would you interpret "None very often," if you go to a theatre, "None very often?"

Q. Well, just to make this comparison there is

(Testimony of Alex Schreiber.)

a group, two "None regularly" which we will circle.

A. All right.

Q. And there is a group of five which just said "No." [1913] A. That is correct.

Q. And then there is one which says "Art" which doesn't indicate any particular theatre, certainly, or any particular location.

A. That is correct. [1914]

Q. Then there are two people that said "Just moved here," which certainly doesn't indicate where they go to the theatre. A. That is correct.

Q. Then there are 72 which just left a blank on that question; correct? A. That's right.

Q. And then one person answered "6 times" here, so he doesn't indicate or she doesn't indicate where she goes to the theatre or he goes to the theatre. A. That's right.

Q. Then there is one that says none for over a year, which we will eliminate for the same reason.

Then there is one which says none, too high price.

Let's go back to page 1. I would like to run over with you the answers that indicate that people go to theatres in Westchester. A. All right.

Mr. Corinblit: I won't move to strike, but that is a comment of counsel. Go ahead.

The Court: You have got the number of people there that indicated they go to theatres somewhere.

Mr. Corinblit: Yes, sir. The questions on the survey speak for themselves, not Mr. Mitchell, but go ahead.

Mr. Mitchell: I will read what they say and I

(Testimony of Alex Schreiber.)

think [1915] there won't be any dispute, at least I won't have any with Mr. Schreiber, I am sure.

92 say then went to the Paradise, so we will put outside here to indicate we are taking care of all these, we will put a 1 in a circle in this first category.

171 said they went to the Loyola. That is in Westchester, isn't it?

The Witness: That is correct.

Mr. Corinblit: What are you doing with that figure, Mr. Mitchell?

Mr. Mitchell: I am putting a little 1 to the side.

Mr. Corinblit: Are you putting that on the exhibit in evidence?

Mr. Mitchell: I am writing a little 1 on the exhibit.

Mr. Corinblit: If you will just designate it, I will put it opposite mine, so I can have a copy.

Mr. Mitchell: That's right.

Mr. Corinblit: All right, go ahead.

Mr. Mitchell: Then we come down here to "neighborhood 18." That isn't so definite, but certainly Westchester you consider a neighborhood, don't you?

The Witness: That's right.

Mr. Mitchell: So we will assume those people would go to the theatre in Westchester. [1916]

The Witness: Went either to the Paradise or Loyola.

Mr. Mitchell: Yes. Then there is another 15 people answered "locally."

(Testimony of Alex Schreiber.)

The Witness: Yes, sir.

Mr. Mitchell: So that sounds like Westchester, doesn't it?

Mr. Corinblit: Just a minute, your Honor, "that sounds like." I will object to that as calling for a conclusion of the witness.

Mr. Mitchell: I will withdraw the question.

Mr. Corinblit: If you want to put your numbers opposite anything you want to, you can go ahead. I am just pointing out it is a conclusion.

Mr. Mitchell: We will put a number opposite locally, a 1 number, for that first category we are talking about.

Here is a category that says "several different ones." We will put a 1 on that. No, I am wrong about that.

Here toward the bottom of the page there are 6 that answered L. and P. Do you have any idea what L. and P. means?

Mr. Corinblit: I object to that, your Honor, as calling for a conclusion of the witness.

Mr. Mitchell: He made the survey.

Mr. Corinblit: That's right, but this is the problem. [1917] This is what was entered on the card. That is why we put this on here as a literal translation of what is on the card.

The Court: I think I will sustain the objection because it is purely a conclusion, what it means.

Mr. Mitchell: All right. We will put a 1 opposite L. and P. in any event.

I thought at the time the exhibit was put in we

(Testimony of Alex Schreiber.)

had agreed that referred to Loyola and Paradise, but maybe I am wrong.

Mr. Corinblit: I just don't know.

Mr. Mitchell: There was one person that wrote "any area."

Mr. Corinblit: Is that "any in area?"

Mr. Mitchell: Any in area.

Mr. Corinblit: You are putting a 1 opposite that?

Mr. Mitchell: Putting a 1 opposite that. Then on the second page there are two persons that said "one close by," and we will put a 1 opposite that.

Then there is one person that said "Loyola and any picture." We will put a 1 opposite that.

Then there is one person that said "Have been to Loyola twice." We will put a 1 opposite that.

Now, if you will check with me on this adding machine tape, we have 92 with a 1 opposite——

Mr. Corinblit: Just a minute.

Mr. Mitchell: You can check here if you want to.

Mr. Corinblit: No. That's all right. Go ahead.

Mr. Mitchell: 92, 171, 18, 15, 6, 1, 2, 1 and 1, making a total of 307.

The Witness: That's right.

Mr. Mitchell: So those at least we interpret as being people that would go to either the Loyola or the Paradise, the only two theatres in Westchester.

Mr. Corinblit: Your Honor, I certainly move to strike the answer and object to the question on the ground this is nothing but pure argument. I

(Testimony of Alex Schreiber.)

don't know what these totals are. I don't know what summaries are being made.

The Court: It is an argument. You can take those figures, Mr. Mitchell, and argue anything you want to with the jury.

Mr. Mitchell: It is in a sense, your Honor, but ordinarily when you put a man on with a survey, you can show what the survey indicates, your Honor. Of course, they are conclusions, I recognize that, but here is the man that made the survey and we have him here now, and if he were really an expert on surveys, you would certainly be able to cross examine him on what the survey shows.

The Court: All right, but I don't know whether you can cross examine him on his opinion of the survey. [1919]

Mr. Mitchell: No, I am cross examining him on what the survey shows.

The Court: All right. You have got before the jury what the survey shows. Now you are asking him what his opinion is.

Mr. Mitchell: I don't want his opinion on it at all, your Honor. I want, as I would with any man making a survey, I want to make some sense out of the survey by showing what the groupings are.

The Court: All right. Go ahead. I think you are arguing, but all right.

Mr. Mitchell: To some extent it is so. I admit that, your Honor. But when you have a surveyor or a man who makes a survey on the stand, that

(Testimony of Alex Schreiber.)

type of question is the only type by which you can develop what the survey shows. [1920]

The Court: You had better go ahead before I change my mind.

Mr. Mitchell: Good, I will do that.

Q. Now, there is another group which we would like to describe as people who attend——

The Reporter: Mr. Mitchell, I don't know whether somebody heard an answer to that. I didn't hear an answer.

Mr. Corinblit moved to strike the answer and I didn't hear an answer.

Mr. Mitchell: There was no answer. There was no question. I think I made a statement.

The Reporter: That is right.

Mr. Corinblit: And I said I thought it was argumentative, your Honor.

Q. (By Mr. Mitchell): There is another group which we would like to characterize as being persons who attend other theatres in the Inglewood-Westchester area, meaning theatres other than the Paradise and the Loyola, and I would like to indicate them with the figure 2—La Tijera, Centinela.

Centinela is a drive-in? A. That is correct.

Q. The Inglewood Theatre or Inglewood?

A. Correct.

Q. Century, that is a drive-in?

A. That is right. [1921]

Q. Fox? A. Inglewood.

Q. Academy? A. Inglewood.

Q. United Artists. There is one that said "Santa

(Testimony of Alex Schreiber.)

Monica and Inglewood” and there is one that says “Ones Post Inglewood” and one says “Any.” Paradise, La Tijera-Inglewood. A. That is right.

Q. Two that say “All over—L.P. L.T.” One indicates “P—Inglewood.” Six that indicate “L.T.”

Four that indicate “L.L.T.” Two that indicate “L.T.” One that indicates “Inglewood, Loyola and others.”

Two that indicate “Local L. T. and L.”

One that indicates “L.T.—Loyola” and one that indicates “L.T. and Centinela.”

I would like to check these with you, Mr. Schreiber. These are the second category, 47?

A. Right.

Q. We will just run through them. We won’t have to have too many words and it won’t cost so much for the reporter to type them.

A. All right.

Q. 8, 3, 2, 7, 2, 1, 1, 1, 2, 1, 6, 4, 2, 1.

A. That is right. That is the one you just called off. [1922]

Q. No, I just called—I am going in order here. I called two and then a one.

A. Where is the one?

Q. There is the one. Excuse me. Here is your one here.

A. That is right. That follows the 2.

Q. Now, we come down to 2. A. Yes. 1.

Q. 1. A. 1.

Q. 1. A. That is right.

Mr. Mitchell: Just a minute. I missed a couple

(Testimony of Alex Schreiber.)

of single ones here. Here is one of those ones and we will mark that with a figure 2.

The Witness: "Any good show (L.P. L. T.)."

Mr. Corinblit: You are going back now, Mr. Mitchell?

Mr. Mitchell: Yes. I will tell you where that is if you want to mark it.

The Witness: It is the ninth from the bottom.

Mr. Corinblit: "L.—L.T. P."

Mr. Mitchell: "Any good show (L.P. L. T.)."

Mr. Corinblit: All right.

Mr. Mitchell: And then there is one other one underneath that that I missed—"L.—L.T. P." which we also mark— [1923] There are your two missing ones. A. Okay.

Q. Making a total of 104 which you indicate?

A. 104 is correct.

Q. Then there is another group which we will characterize as "Other theatres outside Inglewood-Westchester area" which I think you can follow with me. A. Okay.

Q. Which we will mark with the figure 3. Leimert, that is outside of the Inglewood-Westchester area, isn't it? A. That is right.

Q. All of these will be unless you indicate otherwise. Edwards?

A. That is right, drive-in, I believe.

Mr. Corinblit: How are you marking these?

Mr. Mitchell: With the figure 3.

Q. Studio? A. That is a drive-in.

Q. Uptown. A. Correct.

(Testimony of Alex Schreiber.)

Q. Mesa. A. Correct.

Q. Pan Pacific.

A. Correct. You had better write a little larger. You won't be able to tell your figures. [1924]

Mr. Corinblit: Mr. Schreiber, I am confused on the thing. If you will just let Mr. Mitchell ask the questions and go right on down the line.

Q. (By Mr. Mitchell): Baldwin. That is outside the Westchester-Inglewood area, is that right?

A. Yes, that is correct.

Q. Playa. A. That is right.

Q. Drive-ins generally? A. That is right.

Mr. Corinblit: Just a minute—oh, yes.

Q. (By Mr. Mitchell): Culver City?

A. That is correct.

Q. Pickwood. That is over in West Los Angeles? A. That is correct.

Q. Westwood. A. Correct.

Q. Downtown. A. Correct.

Q. Now, in the Loyola and Paradise, they don't have matinees, do they?

A. No, we didn't have any matinees except special kiddies matinees occasionally. [1925]

Q. This says "All theatres that have matinees," so we will mark that with a 3.

We will mark with a 3 "Mostly in L. A."

A. All right.

Q. "Leimert or Mesa."

Mr. Corinblit: Is that on the second page?

Mr. Mitchell: Yes.

Q. "Meralto in Culver City mostly."

(Testimony of Alex Schreiber.)

"All theatres Westwood." A. All right.

Q. "Baldwin Hills and cheaper shows."

Now, I would like to have you check those with me and see if we have all of them for the category

No. 3. A. Starting with 3.

Q. That's right. 3, 1, 8, 1——

A. Just a minute. All right.

Q. 4. A. Right.

Q. 1. A. Right.

Q. 2. A. Wait a minute. Yes, 2.

Q. The next is 1. A. 1.

Q. 6. [1926] A. Right.

Q. 2. A. Right.

Q. 1. A. Right.

Q. 1. A. Right.

Q. 2. A. Right.

Q. 1. A. Just a minute. 1. Okay.

Q. 1? A. Wait until I find that one.

Mr. Corinblit: Where is the one you have just read?

The Witness: I am looking for it. I think that is on the second page. Yes, it is on the second page.

Q. (By Mr. Mitchell): All right. Another 1.

A. Yes.

Q. Another 1. A. Right.

Q. And another 1?

A. That's right, and another 1.

Q. All right, another 1. A. That's right.

Q. That makes 39, the way we have it counted.

There is a fourth group which we won't take time to mark, because that is all that is left, which

(Testimony of Alex Schreiber.)

we will characterize as "Theatres wherever situated, depending upon pictures, and so forth," such as these, Mr. Schreiber:

"Where best pictures, all theatres, several different ones, wherever picture appeals, wherever good pictures are, any good shows, no particular one, varied, any, several, none in Westchester, depends on the show, different ones, various, the one that has two good pictures."

We can check those unmarked ones here, which amount to 99, if you will.

Mr. Corinblit: We will take that number subject to correction.

Mr. Mitchell: It is an adding machine tape.

Mr. Corinblit: Subject to correction, so we can move along.

Mr. Mitchell: That is 99. Now, just to complete the exhibit, Mr. Westbrook, as a matter of mathematics, will you put the percentage of the total number of people answering this questionnaire as to the theatres which they attended in terms of percentage?

Now, may I make a statement with respect to this percentage, your Honor?

The Court: All right.

Mr. Mitchell: The percentages show that these [1928] people in Westchester answering the questionnaire as to where they would go to the theatre show that 19 per cent would go to other theatres in the Inglewood-Westchester area, that is other theatres than the Loyola and the Paradise.

(Testimony of Alex Schreiber.)

That 7.1 per cent would go to theatres outside the Inglewood-Westchester area.

That 17.9 per cent would go to theatres regardless of where they are situated, depending in most instances upon where there was a good picture.

Mr. Corinblit: Your Honor, I take it it is stipulated this statement of Mr. Mitchell is just argument based on his statement of what he believes the records shows.

The Court: Yes, it is an argument, but, however, the chart speaks for itself.

Mr. Corinblit: It is the construction of the chart, of course, that is the important thing.

Mr. Mitchell: I believe it was stipulated that—perhaps this is a part of this exhibit—that in answer to the question, “Do you prefer pictures a couple of weeks later, two good pictures same bill with lower admissions,” yes, 498 and no, 35, with some other scattered answers, when you received that information, did that have any bearing on your determination to try your theatre on a 21 day run policy?

The Witness: No, that didn’t have anything to do with it. [1929]

Q. (By Mr. Mitchell): You did try your theatre on a 21 day policy commencing early in January?

A. That is correct, on the suggestion of Mr. George Hickey from Metro, Mr. George Smith from Paramount, Mr. Wayne Ball of Columbia Pictures, Mr. George Bowser of Fox West Coast Theatres.

(Testimony of Alex Schreiber.)

Q. And you continued that 21 day policy until some time in March, 1951, is that correct?

A. We did not——

Mr. Corinblit: I object to that question as calling for a conclusion. We have had a definition of what Mr. Mitchell means by the word policy.

The Court: Objection overruled.

Mr. Mitchell: Would you please read the question, Mr. Trainor.

(Question read.)

The Witness: No, that was not correct. That was not a policy.

Q. (By Mr. Mitchell): Well, you continued playing pictures regularly on a 21 day availability until March, 1951, that is correct, isn't it?

A. Well, I would like to answer it my way.

Q. Suppose you answer it yes or no and then explain.

The Court: Can't you answer yes or no?

Mr. Corinblit: Your Honor, the schedule showing the [1930] pictures and the availability is in. Mr. Mitchell spent 15 minutes reading that to the jury yesterday. We don't quarrel with the schedule. It shows there were 21 day pictures played during that period.

Mr. Mitchell: That satisfies me. You answered for him. That's all right. We have no further questions.

The Court: Mr. Johnston?

Mr. Johnston: No questions.

The Court: You may step down.

Mr. Corinblit: Your Honor, there is only one matter. Well, I think the categories speak for themselves. We have completed with Mr. Schreiber, subject only to recalling him for the purpose of damages in the light of the evidence.

Mr. Mitchell: I omitted to offer the schedule which was offered in evidence, your Honor. I would like to do that.

Mr. Corinblit: I will certainly object to that, if your Honor please. This is really pure argument, because the categories have been constructed by Mr. Mitchell.

The Court: Objection overruled. It may be admitted in evidence.

The Clerk: As a Joint Distributors' Exhibit?

Mr. Mitchell: Joint Distributors' Exhibit.

The Clerk: Exhibit T. [1931]

(The exhibit referred to was received in evidence and marked as Joint Distributors' Exhibit T.)

The Court: You may step down.

(Witness withdrawn.)

The Court: Call your next witness.

Mr. Corinblit: The plaintiff will call Mr. Marco Wolff.

MARCO WOLFF

called as a witness herein by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: You may take the stand. Will you state your name, please?

The Witness: Marco, M-a-r-c-o, Wolff, W-o-l-f-f.

Direct Examination

Q. (By Mr. Corinblit): Mr. Wolff, how long have you been in the theatre business?

A. About 40 years.

Mr. Mitchell: What was that answer?

(Answer read.)

Q. (By Mr. Corinblit): You have been in the theatre business in the Los Angeles area, have you? A. Yes. [1932]

Q. During a period in 1950, were you connected with a corporation known as the Southside Theatre Corporation? A. Yes.

Q. And in that capacity did you have an arrangement whereby you were buying and booking for the Paradise Theatre?

A. Yes, for about ten or twelve weeks.

Q. Ten or twelve weeks in the fall of 1950?

A. Yes.

Q. And that ran from approximately August 23rd, on the opening, through the end of November and perhaps the early part of December?

A. Yes.

Q. Now, prior to that time, Mr. Wolff, had you had a conversation with Mr. Charles Skouras, iden-

(Testimony of Marco Wolff.)

tified as the president of the defendant Fox West Coast, with respect to the Loyola area? A. Yes.

Q. And about when did that conversation take place? A. 1944 or '45.

Q. And who was present at that conversation?

A. I don't recall who else was there beside Mr. Skouras.

Q. And where did the conversation take place?

A. In Mr. Skouras' office.

Q. And will you tell us what was said, please?

Mr. Johnston: Your Honor, I am going to object to that as being too remote to the issues involved in this lawsuit.

The Court: I don't know whether it is or not. It may be or it may not be. The objection is overruled.

Q. (By Mr. Corinblit): Will you tell us what you said and what Mr. Skouras said?

A. I had been approached by a real estate man by the name of Worthington of the Frank Ayers Development Company, which had developed Westchester.

He was trying to sell me the corner of Sepulveda and Manchester Avenue for a theatre. I was especially interested because I had a home that I was trying to dispose of and he manifested some interest in accepting the home on some kind of a trade.

At that time Westchester was very undeveloped. There were wide fields of oats. I went to Mr. Skouras to try to interest him into going into that

(Testimony of Marco Wolff.)

theatre with us because at that time we were in partners with Fox West Coast Theatres in the Fifth Avenue Theatre on the east side of Inglewood.

I thought it was appropriate to offer him the opportunity to go in with us, if he chose to do so, on the west side of Inglewood, as Fox West Coast had a number of theatres in Inglewood, and as a partner I thought it was appropriate to approach him. [1934]

Mr. Skouras stated that he was not interested in that location for a theatre at that time with us and that we should not go in there; that we had gone into the Fifth Avenue situation in Inglewood, and that had been worked out in the partnership arrangement, and that we should not go in the Loyola district,—which became the Loyola district after they built the University there and later the Loyola Theatre was built.

Q. What did he tell you—what else did he say about the Loyola district?

A. At that time he didn't like the district too much. He told me it was a little undeveloped, and that he was not interested in it at that time. However, later on they built the Loyola Theatre as a Fox West Coast Theatre.

The Court: How much later?

The Witness: Perhaps two years.

The Court: There had been quite a lot of development in the meantime?

The Witness: It showed promise and of course it developed very rapidly.

(Testimony of Marco Wolff.)

Q. (By Mr. Corinblit): In that conversation, did you ask him if he objected if you took it for yourself?

Mr. Mitchell: Object to that.

Mr. Johnston: I object to that as leading.

The Court: Sustained. [1935]

Q. (By Mr. Corinblit): What, if anything, did you say—what else did you say to him?

A. I did ask him if he would permit me to go in by myself and he objected to it.

Q. What did he say?

A. Well, he said something to the effect that he objected to my going into the Fifth Avenue district after I had gone into it, although I had had earlier approval to go in there and that had been worked out on a friendly basis later.

He didn't want me to go into that district on the west of Inglewood, so I abandoned it.

Q. Is that all that you recall about the conversation? A. It is.

Q. I will show you, Mr. Wolff, a copy of the transcript in Fanchon & Marco, Inc., versus Paramount Pictures, Inc., at page 437, and ask you to read the question and the answer there at the bottom of the page. And after reading it, I will ask you if that refreshes your recollection concerning anything else that was said at the meeting.

Mr. Johnston: There is no pending question as to which his memory is being refreshed.

Mr. Corinblit: Yes. He stated that he didn't recall anything else concerning the conversation.

(Testimony of Marco Wolff.)

Mr. Johnston: May I see the thing you are showing the witness? [1936]

Mr. Corinblit: Yes. The question and the answer—let me show it to counsel first and then I will return it to you, Mr. Wolff.

Mr. Johnston: Your Honor, I will defer my comments.

The Court: The only question is, does it refresh his memory, and he can answer that “Yes” or “No.”

Mr. Johnston: I submit this is an improper way to refresh the witness’ memory.

This memorandum was not made at the time or anywhere near the time of the conversation. This is testimony given in 1951, six years after the alleged conversation.

Mr. Corinblit: But it is concerning the precise conversation.

Mr. Johnston: My objection is—

The Court: Just a minute. I know it is very difficult to remember conversations after they are four or five years old. A witness may forget something, and anything that recalls the incident or recalls the conversation I think is legitimate.

Mr. Johnston: My understanding of the rule is simply this, that the document which is the refreshing document must have been made at or about the time of the event which is supposed to refresh the witness’ memory.

This transcript was in 1951. The event concerned here is 1945. [1937]

(Testimony of Marco Wolff.)

The Court: Objection is overruled. You may answer the question "Yes" or "No."

Q. (By Mr. Corinblit): Does it refresh your recollection as to something else that was said?

A. Where do you want me to read?

Q. The question beginning at the first word "What" at the bottom of the page, and the answer—just that question and answer.

A. I think I have about answered that.

The Court: The only question is, does it refresh your recollection?

The Witness: Yes.

The Court: If it does, then say "Yes."

The Witness: Yes, sir.

The Court: Let me look at it.

Mr. Corinblit: Yes. It is at the bottom of the page, your Honor.

The Court: It is just exactly the same thing that he testified to. I don't know. He put it in different wording is all. I don't know how it could refresh his memory in any way.

Mr. Corinblit: What we are trying to do is refresh his memory as to the exact words, if that is possible. That is my purpose. If it doesn't that is all there would be to it. The witness stated it does refresh his recollection, and I [1938] need only ask him the question.

Q. What do you recall?

The Court: Now, he already testified as to the conversation that took place. Do you recall any-

(Testimony of Marco Wolff.)

thing more about the conversation that you haven't testified in this case?

The Witness: I think I gave the same general answer now as I did then. The wording was a little differently made.

I did say in that testimony that Skouras——

Mr. Johnston: Wait a minute. I object to what Skouras said.

The Court: You can't testify what you said in that testimony. The only thing you can testify to is what your recollection of the conversation is.

The Witness: It recalls to my mind that the term of "invading the territory" was used and that he objected to my "invading that territory" where the Loyola Theatre later came and he had previously objected to my invading the territory in which we built the Fifth Avenue Theatre and that that had been resolved by a partnership.

The Court: When this conversation took place there was no Loyola Theatre there?

The Witness: That is right, sir.

The Court: It was open territory, was it not?

The Witness: That is right.

The Court: Did he say that he claimed that territory [1939] for Fox?

The Witness: Well, in those days and in subsequent days it was not considered good business to go into opposition with the big circuits.

The Court: Well, by "big circuits"——

The Witness: Without their permission, so I asked for it.

The Court: You had been a friend of Mr. Skou-

(Testimony of Marco Wolff.)

ras for a long time?

The Witness: Yes, sir.

The Court: On friendly relations with him?

The Witness: Yes, sir.

The Court: You were in a partnership deal with him?

The Witness: Yes, sir.

The Court: And you went over and talked to him on a friendly basis?

The Witness: Yes, sir.

The Court: And he advised you not to go into that territory?

The Witness: Yes, sir. [1940]

Mr. Corinblit: Now, your Honor has asked some questions here, without objection by counsel, and I have got to go just a little bit further, since your Honor has asked some questions about this friendly conversation.

The Court: He hasn't indicated anything except he said he was friendly to Mr. Skouras.

Mr. Corinblit: Yes, sir. Personally, I am sure there is no——

The Court: You don't think he knows what friendly means in the motion picture business?

Mr. Corinblit: Yes, I am sure Mr. Wolff knows what friendly means. I am sure he knows what it means. But I think I should ask this question, and your Honor can rule on any objection that is made.

Q. Was the acquisition of the partnership interest by Mr. Skouras in the Fifth Avenue Theatre a friendly matter, Mr. Wolff?

Mr. Johnston: Have you completed the question?

(Testimony of Marco Wolff.)

Mr. Corinblit: Yes.

Mr. Johnston: I am going to object to that as being totally immaterial to the issues involved in this lawsuit.

The Court: Sustained. He has already testified it was a friendly adjudication. That is what he said, I think.

Mr. Corinblit: Well, I think we can refer to a document that is already in evidence. We will go on and come [1941] back to this subject.

Q. Mr. Wolff, subsequently in—I will withdraw that to ask this question on that subject.

Was there a lawsuit filed by your company against Fox West Coast with respect to the acquisition of the Fifth Avenue Theatre in the Inglewood area?

Mr. Johnston: Your Honor, I am going to object to that as being immaterial to the issues involved in this case and, furthermore, being an attempt to impeach the testimony of his own witness, Mr. Wolff here.

The Court: Sustained.

Mr. Corinblit: Your Honor please——

The Court: We are not adjudicating any other theatre except the Paradise and possibly the Loyola Theatre. That's all.

Mr. Corinblit: Yes, sir. I would never have asked the question if your Honor hadn't asked the questions you did. You have asked a question and there is an incorrect inference.

The Court: I didn't ask the—I didn't dictate to

(Testimony of Marco Wolff.)

the witness what he said. I asked if he was friendly to Mr. Skouras and he said he was.

Mr. Corinblit: All right. I will let my question stand. I am not withdrawing my question.

The Court: You can take an exception to the ruling.

Q. (By Mr. Corinblit): Mr. Wolff, in the fall of 1950 [1942] when you were buying and booking for the Paradise Theatre, did you have any negotiations with any of the representatives of the film companies to obtain product for the Paradise Theatre? A. Yes.

Q. And what were the companies with whom you had discussions?

A. Paramount, Warner Bros., Columbia, Metro-Goldwyn-Mayer, and through my bookers with Universal and probably United Artists, RKO.

Q. Turning to Warner Bros., did you have some discussion with Mr. Herbel to obtain pictures for the Paradise? A. Yes.

Q. About when did the conversation take place?

A. A few weeks before the opening of the Paradise Theatre.

Q. Where did it take place?

A. Several conversations took place at his farm and also at my farm, which was close to his.

Q. Was anyone else present other than yourself and Mr. Herbel?

A. Not in the business conversations.

Q. Would you state what you said to him and what he said to you, as best you can recall?

(Testimony of Marco Wolff.)

A. I tried to get first run pictures for the Paradise, told him that since the Loyola had been established as a first [1943] run theatre up the block, a couple of blocks, playing other product, but principally Twentieth Century-Fox, that it would be an opportunity to get film rental for Warner Bros.

But he told me that he could not give us first run.

I then tried to get the next availability, which was 7 days after first run. He did sell us, as I recall, the three pictures to open the theatre with for the first, second and third weeks, first run, 7 days availability.

Subsequently, I had other conversations with him.

He told me that he thought he might be able to get us first run for the Paradise, but later advised us that he was unable to do so.

Q. Other than those three 7 day pictures, Mr. Wolff, you were unable to obtain any Warner pictures on 7 days, is that correct?

Mr. Mitchell: Now, just a minute. That is a leading and suggestive question, trying to put words into the witness' mouth. He was offered the opportunity to bid all through the time, and to put that kind of a question with his own witness is to lead him. I object to the form of the question.

Mr. Corinblit: The record shows that after that there were no other pictures 7 days at the Paradise.

Mr. Mitchell: That isn't quite what the record shows. [1944]

The Court: May I ask the witness a question?

(Testimony of Marco Wolff.)

Do you remember the name of the first Warner pictures you got?

The Witness: I remember one of them, Baby Mine. Tea For Two is the second one, the third one I don't recall at this instant.

The Court: Was Baby Mine a grade A picture? You know what a Grade A picture is.

The Witness: Yes, sir. It is a rare bird, a Grade A picture.

The Court: Was it a Grade A picture?

The Witness: I think we refer to them as a sort of nervous A.

The Court: How about Tea For Two?

The Witness: I think that was a Grade A picture. Maybe the record——

The Court: You wouldn't have any complaint as to the quality of the pictures Warner Bros. gave you on the first three weeks?

The Witness: They were the best ones they had available at the time.

The Court: The best ones they had available?

The Witness: Yes, sir. Maybe it was Three Secrets. Was that a Warner Bros. picture?

Mr. Corinblit: Yes. I think the record will show what the three pictures were. [1945]

The Court: As far as you are concerned, you got from Warner Bros. the best pictures that were available at the time?

The Witness: On a 7 day availability.

The Court: On the 7 day availability.

(Testimony of Marco Wolff.)

The Witness: The first three weeks of the Paradise Theatre's opening.

The Court: All right.

Q. (By Mr. Corinblit): Subsequently did you have a conversation with Mr. Herbel about obtaining additional 7 day pictures for the Paradise, do you recall?

A. Yes, but I was unable to get additional pictures from Warner Bros., as I recall it, either from Warners and several other companies. I did get a couple of them from Columbia—Born Yesterday, which was a big picture, big hit, and did very well at the Paradise, and a James Cagney picture. I think it was called—not Silent Night but it had something to do with the night—Lonely Night.

Q. I will show you, Mr. Wolff, Exhibit 45-J, which is the play-off of the Paradise. I first call your attention to the fact that the picture Born Yesterday played in March 1951. Would that refresh your recollection that that was not a picture that you had anything to do with it?

A. That's right. I just remembered it did well there, and we played it in another theatre. I have the wrong date. [1946]

Q. The play-off you were concerned with runs from August 23, 1950, to November 1950. The Columbia picture on the 7 day availability indicated is the picture In a Lonely Place.

A. In a Lonely Place, yes. [1947]

Q. Now, with respect to Warner's, did you have any conversation with Mr. Herbel with respect to

(Testimony of Marco Wolff.)

the matter of bidding subsequent to the three pictures that you obtained?

A. I don't remember which companies required bidding at the beginning, but later on all companies seemed to require bidding.

Q. And against what theatres were you required to bid?

Mr. Mitchell: That calls for some sort of a conversation or some sort of piece of paper and not a generality. They were different as to different companies.

The Court: When you are talking about you were required to bid, you mean bid for the Paradise?

Mr. Corinblit: Yes.

Q. (By Mr. Corinblit): Mr. Wolff, let us first talk about Warner Bros. I will show you Plaintiff's Exhibit 10-J in evidence which lists the theatres as far as Warner Bros. is concerned, that are included in the bids for the seven-day availability, and I call your attention to the fact that the exhibit refers to the Paradise, United Artists, Fox, La Tijera, Imperial, and Southside.

Now, you were operating the Southside Theatre at that time, were you not? A. Yes.

Q. In bidding for the Paradise Theatre with respect to Warner's, there has been put into evidence exhibits showing [1948] the bids sent from Warner's and what was returned by you.

Now, first I want to show you Exhibit 10-L, which is in evidence——

(Testimony of Marco Wolff.)

Mr. Mitchell: They are the requests for bids sent by Warner Bros.

Mr. Corinblit: Yes. And it has been stipulated in this case, Mr. Wolff, that when the Warner's list came to you they would include the theatres that I have named opposite the term "Clearance", the maximum clearance to be granted for this run shall be, and opposite that "Terms" were included all these theatres, and then when you returned the forms to Warner's on Exhibit 10-L, you struck out every other theatre indicated other than the La Tijera.

Now, you did that with respect to the picture Rocky Mountain, with respect to the picture The Glass Menagerie, with respect to the picture Break Through, and with respect to—I think those are the only—I don't have any others other than the one other bid returned.

Now, I want to show you Plaintiff's Exhibit 10-J. 10-J is a copy from your files of the bid—in our files of the bid with respect to the picture Three Secrets, and I call your attention to the fact that nothing is struck out from the names of the theatres indicated.

I will ask you whether you have a recollection as to the matter of their not having in that one bid return, not having [1949] struck out all of the theatres except the La Tijera.

The Witness: I have no recollection of it, but I would know that it was contrary to our booking

(Testimony of Marco Wolff.)

plan at the time, because we didn't require clearance over these theatres.

Q. (By Mr. Corinblit): You didn't ask for clearance over them?

A. No, and we didn't in any other case, as you pointed out to me, with exception of one theatre, the closest one to the Paradise.

Q. And that is the La Tijera?

A. Yes, sir.

Q. As a matter of fact, you were operating the Southside at that time? A. Yes.

Q. And you never asked the distributors to give you clearance over your own theatre? A. No.

Mr. Mitchell: Objected to as leading and suggestive and also argumentative and contrary to the facts. He did once whether by inadvertence or otherwise.

The Court: I notice it is 11:00 o'clock and we are about to take another recess.

Again, ladies and gentlemen, it is my duty to admonish you not to discuss this case with anyone. You are not to permit anyone to discuss it with you, and you are not to [1950] formulate or express any opinion as to the rights of the parties until the case has finally been submitted to you.

With that admonition we will now recess until 15 minutes after 11:00 o'clock.

(Whereupon, a recess was taken.)

The Court: Do you stipulate the jury are present and in the jury box?

Mr. Corinblit: So stipulated.

(Testimony of Marco Wolff.)

The Court: You may proceed.

Q. (By Mr. Corinblit): Mr. Wolff, turning to the defendant Paramount. There is in evidence the Paramount plan under which bidding set up in the Inglewood-Westchester area prior to your buying and booking for the Paradise Theatre, by which Paramount offered two runs for bidding with the staggered, so-called staggered clearance provided for in the plan.

I don't want to go back over that testimony with you since it has been gone into extensively, Mr. Wolff, but there has also been some evidence with respect to the fact that you were at that time bidding for the Paradise—you were at that time representing the Paradise and the Southside Theatre.

Now, do you recall during this period, Mr. Wolff—I will withdraw that. [1951]

Mr. Corinblit: Let me offer in evidence Plaintiff's Exhibits 2-C and 2-D.

Mr. Mitchell: May I see those.

Mr. Corinblit: Yes. We will offer those in evidence, your Honor.

The Court: They may be received in evidence.

The Clerk: Plaintiff's Exhibits 2-C and 2-D.

(The exhibits referred to were received in evidence and marked as Plaintiff's Exhibits 2-C and 2-D.)

Q. (By Mr. Corinblit): There is now in evidence, Mr. Wolff, the bids that you submitted on behalf of the Paradise Theatre on the picture Sunset Boulevard, on the picture Fancy Pants and on the

(Testimony of Marco Wolff.)

picture Union Station. Do you remember, Mr. Wolff, that with respect to the pictures that were involved while you were representing the Paradise from Paramount, that the Southside didn't play any picture that the Paradise played, and when the Southside played, the Paradise didn't play?

Mr. Mitchell: That is a leading and suggestive question. I object on that ground, your Honor.

Mr. Corinblit: Mr. Mitchell has put in evidence with respect to the play-off of these pictures, and it is just something there should not be a lot of time on. The question is with respect to four pictures, whether they played in the Southside and the Paradise, or whether they [1952] didn't. I can ask Mr. Mitchell to stipulate to the fact, or we can get it in a short manner in this way. There is no argument about the matter.

Mr. Mitchell: I am glad to stipulate with you about the facts if we can get all the facts in and not part of the facts.

Mr. Corinblit: All right.

Mr. Mitchell: What is it you want? Let's get the whole story.

Mr. Corinblit: All right.

Mr. Mitchell: Starting with what period of time?

Mr. Corinblit: Starting with the fall of 1950. We will come back to the picture Sunset Boulevard. A bid was put in by the Paradise. Is that correct?

Mr. Mitchell: That is correct.

Mr. Corinblit: Was a bid put in by the Southside?

(Testimony of Marco Wolff.)

Mr. Mitchell: That is correct.

Mr. Corinblit: And the Paradise and Southside got the picture.

Mr. Mitchell: A bid was put in by the Paradise, Ritz, United Artists, the Academy and the Southside, and the picture was awarded to the Paradise and the Southside.

Mr. Corinblit: Will you start with the picture just before Sunset Boulevard?

Mr. Mitchell: Sure. [1953]

Mr. Corinblit: We will go on then.

Mr. Mitchell: What do you want? The Furies?

Mr. Corinblit: Yes.

Mr. Mitchell: The Furies was offered to the Paradise, Southside, La Tijera, Imperial, Rio, Ritz, Academy, Fifth Avenue, Fox and United Artists. Bids were put in by the La Tijera, Imperial and Fox, and the bid was awarded, one 7 day run to the La Tijera and one at the Imperial. That is correct, isn't it?

Mr. Corinblit: Right. Now we have got Sunset Boulevard.

Mr. Mitchell: That would leave the inference that theretofore there has not been an opportunity given to the Paradise to bid by Paramount.

Mr. Corinblit: I don't mean that.

Mr. Mitchell: I would like to have you stipulate Paramount offered the Paradise an opportunity to bid on Beau Geste and the Bengal Lancers, on Irma Goes West, and on The Lawless, prior to The Furies. Then after Sunset Boulevard——

(Testimony of Marco Wolff.)

Mr. Corinblit: We will go into those in a minute, Mr. Mitchell.

Mr. Mitchell: All right. Is that correct?

Mr. Corinblit: Yes, that is correct. Now, will you stipulate with me that those three pictures all played, I [1954] believe, prior to the opening of the Paradise? Have you got the dates? Not The Furies. The Furies played after the opening, but the other three, Beau Geste, Lawless, and Irma—you know that Irma played before. That was in June 1950.

Mr. Mitchell: Yes. I am not sure how much before. Just a minute and let's see if we can agree. You are correct. Beau Geste and The Bengal Lancers, Irma Goes West, and The Lawless, all actually played before the Paradise got open.

Mr. Corinblit: And The Furies, you have listed the theatres that were offered bidding and the theatres that did bid?

Mr. Mitchell: Yes. We stipulated that.

Mr. Corinblit: All right. Now, turning to the picture Sunset Boulevard, which I think is the next one in order, Sunset Boulevard, we have also stipulated there was a bid, and who was awarded the picture.

Mr. Mitchell: That's right. I would like to have you agree the picture was offered to the same group of theatres, and I won't have to repeat them each time, because it is always the same group of theatres, Paradise, Southside, La Tijera, Imperial, Rio, Ritz, Academy, Fifth Avenue, Fox and United Artists.

(Testimony of Marco Wolff.)

Mr. Corinblit: On competitive bid.

Mr. Mitchell: On competitive bid for two runs.

Mr. Corinblit: Right. [1955]

Mr. Mitchell: And the bidders on Sunset Boulevard were Paradise, Ritz, United Artists, Academy, and Southside, and the two runs were awarded to the Paradise and Southside.

Mr. Corinblit: Now we will go to the next picture, Fancy Pants. Can you give me the theatres that received a request for bids and the theatres which submitted bids, and the theatres which were awarded the picture?

Mr. Mitchell: The same group received requests for offers. Bids were submitted by Paradise, La Tijera, Ritz, United Artists, Academy, Imperial and Southside, and the picture was awarded to the La Tijera and the Southside.

Mr. Corinblit: All right. I will stipulate to that fact. That was Fancy Pants.

Mr. Mitchell: The next one is Union Station.

Mr. Corinblit: Right, Union Station.

Mr. Mitchell: Requests for bids were submitted to the same group of theatres and bids were submitted by Paradise, La Tijera, Fox, Ritz and Imperial, and the picture was awarded to the La Tijera and the Imperial. Right?

Mr. Corinblit: Right.

Mr. Mitchell: The next picture?

Mr. Corinblit: Well, those are the only pictures that are involved during Marco's period.

Mr. Mitchell: Let's check.

(Testimony of Marco Wolff.)

Mr. Corinblit: I may be incorrect. There may be another [1956] picture that I didn't have the information on, Cassino to Korea.

Mr. Mitchell: We will check it, Mr. Corinblit.

Mr. Corinblit: All right.

Mr. Mitchell: Cassino to Korea played in November. Bids were requested of the same theatres. Bids were submitted to La Tijera and Imperial, and the picture was awarded to the La Tijera and Imperial.

Mr. Corinblit: Right.

Mr. Mitchell: Copper Canyon played December 5.

Mr. Corinblit: I think you have already put in evidence, or you have in evidence the fact that a bid—do you have the theatres that submitted bids there?

Mr. Mitchell: Bids were requested of the same theatres and bids were submitted by La Tijera, United Artists, Academy, Imperial, and Southside, and the bids were awarded to Academy and Southside. Is that correct?

Mr. Corinblit: I will stipulate that subject to any check I have.

Q. Now, Mr. Wolff, the record shows that with respect to a number of pictures that you requested on some pictures clearance over the La Tijera Theatre. In your conversations with any of the film companies represented, the defendants in this case, did you have any discussion with respect to whether or not the Paradise was going to request clearance

(Testimony of Marco Wolff.)

over any [1957] other theatre other than the La Tijera?

A. I don't believe we ever requested clearance over any other theatre except the La Tijera that I recall. [1958]

Q. Now, evidence has been introduced to show that on occasions for some pictures you asked for clearance over the La Tijera.

Now, in 1950 did you have an opinion as to whether or not the Paradise Theatre was in substantial competition with the Southside Theatre, the Academy Theatre, the Fifth Avenue, downtown Inglewood theatres, Imperial, Rio, La Tijera—did you have an opinion on that?

A. On the Paradise?

Q. Yes. A. Yes.

Q. All right, what was your opinion with respect to the existence of substantial competition between the Paradise Theatre and those theatres?

A. I don't think it existed between the Paradise and those theatres.

The Court: Did it exist between any theatres?

The Witness: I thought it was in partial competition with the La Tijera.

The Court: How about the Loyola?

Mr. Corinblit: I didn't mention the Loyola.

The Witness: He didn't bring that up.

The Court: I said was it in competition with any theatre.

The Witness: All theatres are in competition

(Testimony of Marco Wolff.)

with each [1959] other in the same city. It is simply a matter of degree.

The Loyola Theatre was up the block and played product first run. That product was not available competitively to the Paradise Theatre because they couldn't get first run.

So, I would say the Loyola product was not in competition with the Paradise, although the theatre itself was because some people would naturally make the choice between the first run at the Loyola and a subsequent run at the Paradise and the majority of the choice would naturally go to the first run theatre.

The Court: Then the 7 day availability theatre in your opinion—the only theatre in which the Paradise was in substantial competition was the La Tijera?

The Witness: I didn't say, your Honor, it was in substantial competition with the La Tijera. I think there was a partial competition with the La Tijera. It was the closest theatre.

The Court: How far away was it?

The Witness: I would say a little under two miles.

The Court: If you asked for clearance over the La Tijera, isn't it the same as saying you think the La Tijera is in substantial competition?

The Witness: No, because even a little competition on the same picture might be the difference between profit and loss.

Few theatres make as much as five to ten per

(Testimony of Marco Wolff.)

cent of [1960] their gross, and if the gross was effected five to ten per cent, which is only a minority part of the gross, it could still destroy the profit without being in substantial competition.

As I said before, substantial competition means different things in different situations.

A first run theatre like Warners Beverly or Warners Hollywood running Cinerama——

The Court: You are talking to the jury and not to me. Turn around and talk to the jury.

The Witness: Well, Warners Hollywood has been running, before it changed to its second edition, Cinerama, for nearly three years and it could do that because it had no competition in the entire Southern California area.

It would have been a minor competition if each one of the 20 or 30 districts in the vicinity affected the gross of that theatre only one or two per cent, because if you combined it in the entire area, that would approximate some 40 or 50 per cent of the business that the Warners Hollywood might get. But first run competition is only one form of the competitive problem for a first run theatre, for a first run theatre to run, another form is 7 day availability and another effect is achieved with a 14 day or 21 day availability.

21 day availability has less competition, I would say, in a neighborhood because each individual neighborhood, after [1961] the picture has already been screened in several houses ahead of the 21 day

(Testimony of Marco Wolff.)

availability, it depends then on its immediate surroundings.

Now, on a 7 day availability the La Tijera was in partial competition, I would say, with the Paradise and I asked for the clearance over that particular house and over none other that I recall, because I thought it might affect the gross five per cent which might take all possible profit on a picture.

Q. (By Mr. Corinblit): Mr. Wolff, what was the basis of your opinion that the Paradise was not in substantial competition with the theatres in Inglewood?

Mr. Mitchell: That is not quite a fair question, your Honor, because it assumes a fact that is not in evidence. The witness has just explained what he means by competition, and to say that the La Tijera wasn't in substantial competition forces this witness to answer something that he hasn't said.

The Court: Well, he is changing the term. Instead of "substantial competition" he uses the term "partial competition."

May I ask the witness, does distance have anything to do with the question of competition?

The Witness: Yes, sir.

The Court: And in the day of automobile, distance doesn't mean as much as it did 20 years ago, does it? [1962]

The Witness: That is right.

The Court: How far is the Paradise Theatre from the Eastside Theatre?

The Witness: From the Southside Theatre?

(Testimony of Marco Wolff.)

The Court: Southside Theatre?

The Witness: Eight miles, approximately. They were not in competition at all. We never considered it so. We were always willing to play the Southside together with the Paradise.

The Court: Then as far as that area was concerned, and Inglewood was concerned, seven or eight miles would take a theatre out of substantial competition?

The Witness: Yes, sir. Even four miles would in that area. We played the Southside Theatre weekly with the Academy Theatre and other theatres about four miles from each other.

The Court: Four miles?

The Witness: Yes, sir.

The Court: You think there is no substantial competition between theatres that are four miles apart?

The Witness: On certain neighborhood runs, that is right. It would be different on first run.

The Court: Seven days.

The Witness: Seven days. I would say they are not in substantial competition. [1963]

We proved that by the Southside being a successful theatre playing most of the pictures at the same time the Academy, four miles away, and—a little less than four miles away.

The Court: You didn't find any indication that your gross was affected?

The Witness: I think it would be a better gross if the Academy wasn't there, but we are able to

(Testimony of Marco Wolff.)

show a profit at the Southside with the Academy there and playing at the same time that we do.

The Court: Then, as far as you were concerned, the Southside and the Academy were not in substantial competition?

The Witness: That is right.

The Court: That is four miles. How about three miles or two miles? Is a theatre in substantial competition then?

The Witness: It would depend on the run. I would say they are in less competition on a 21 day run, a little more on a 14 day run and a little more on a 7 day run.

I attempted through the film companies to get a 7 day availability at the Paradise and was willing to play day and date with all of the downtown Inglewood theatres, which was about three and a half to four miles away.

The Court: And they refused upon the ground that the theatres were in competition?

The Witness: Most of the film companies said—no, [1964] it wasn't the film companies alone—Fox West Coast, which wanted clearance at the Academy over the Paradise, so the film companies if they sold to the Academy on that basis had to observe their bid—they couldn't sell the Paradise. If the Academy bought the picture they could sell the Southside because the Academy didn't ask for clearance over the Southside.

Q. (By Mr. Corinblit): And the Southside was closer to the Academy than the Paradise, isn't that

(Testimony of Marco Wolff.)

right? A. A little closer.

Mr. Corinblit: I have no further questions.

The Court: May I ask this witness a question?

Mr. Corinblit: Yes, your Honor. Before you do that, I wonder if I could ask just one question. Pardon me, sir.

The Court: Do you want to know the question I am going to ask?

Mr. Corinblit: No, just this one question.

Q. Mr. Wolff, the court in discussing with you your conversation with Mr. Skouras, asked you—he used the word “friendly.” What did you understand the court to mean by the word “friendly”?

Mr. Mitchell: Now, your Honor, we will object——

Mr. Corinblit: Let me finish my question.

Q. What did you understand by the use of the term “friendly” in your answers to the court’s question? [1965]

A. I thought it was——

Mr. Mitchell: I object to the question on the ground it calls for a conclusion of the witness. The word “friendly” is a well understood word.

The Court: It is like “competition.” Let him give his definition. The objection is overruled.

The Witness: I thought the court was asking me about my personal relations with Mr. Skouras, which were friendly as they are with all mankind.

Mr. Corinblit: And not about your business relations?

The Witness: That is right.

(Testimony of Marco Wolff.)

Mr. Corinblit: No further questions.

The Court: How many weeks were you the booker for the Paradise Theatre?

The Witness: About ten weeks.

The Court: Ten weeks?

The Witness: Yes, sir.

The Court: And at the same time you were the booker for the Southside?

The Witness: Yes, sir.

The Court: All right. Now, in your dealing with the various exhibitors, you were dealing at the same time with the Southside and the Paradise?

The Witness: Yes, sir.

The Court: Was there any difference—did the bookers, [1966] did the distributors act any differently so far as you were concerned when they came to deal with the Southside than they did with the Paradise?

The Witness: Yes, sir.

The Court: They did?

The Witness: Yes, sir.

The Court: How?

The Witness: They couldn't sell me—several of the film companies wouldn't sell me the pictures for the Paradise which they would at the Southside because the Academy and the downtown theatres in Inglewood had demanded clearance over the Paradise.

The Court: That is the only difference?

The Witness: I can't think of any other. I couldn't get the pictures. There was enough differ-

(Testimony of Marco Wolff.)

ence to prevent me getting the pictures for the Paradise in a number of instances.

The Court: That was the reason, the downtown theatres demanded clearance?

The Witness: That is the only reason I can think of at this time. There may have been other reasons, but I can't think of them at this time.

The Court: Very well. [1967]

The Witness: Am I through?

The Court: No, not quite.

Cross Examination

Q. (By Mr. Mitchell): Now, Mr. Wolff, you have been in the motion picture exhibition business, you say, for in the neighborhood of 40 years?

A. Yes, sir.

Q. You are the Marco of Fanchon & Marco, correct?

A. Yes, sir.

Q. And your sister is Fanchon?

A. Yes.

Q. And you made famous the Fanchon & Marco stage shows which were used in large theatres throughout the United States, is that true?

A. Well, I don't know if I should qualify as famous, but they were well advertised.

Q. You don't need to be so modest. In 1950 and 1951, when you were buying and booking for the Paradise Theatre, you also operated the Southside Theatre in the southwest Los Angeles area?

A. Yes, sir.

Q. And the Rio?

A. Yes. [1968]

Q. And the Alto?

A. Yes.

(Testimony of Marco Wolff.)

Q. And the Balboa? A. Yes.

Q. And then across the Baldwin Hills you were also operating the Baldwin? A. Yes, sir.

Q. The Baldwin Theatre you have operated from the beginning on a 21 day policy, correct?

A. Almost entirely.

Q. And your Baldwin Theatre is a very successful theatre on that policy, isn't it?

Mr. Corinblit: Object to that, your Honor, as being remote.

The Court: Sustained. I don't know what difference it makes. I think we can stipulate Fanchon & Marco have been very successful in the motion picture business. I don't know.

Mr. Mitchell: You also at that time operated the Paramount Downtown and the Paramount Hollywood Theatre under a franchise from Paramount?

The Witness: Yes.

Q. (By Mr. Mitchell): And you also had interests in a group of theatres in Long Beach?

A. Yes.

Q. And you also had interests in a group of 25 or so [1969] theatres in St. Louis? A. Yes.

Q. You have just said in talking of Cinerama, that you think a first run show case theatre draws patronage from all the metropolitan area.

A. Yes.

Q. Not a great amount from, let us say, Pasadena or Glendale or Westwood or Inglewood or Huntington Park or Belvedere Gardens, but all to-

(Testimony of Marco Wolff.)

gether a substantial patronage from those outlying cities. A. Yes.

Q. And if a first run were established in each of those outlying cities to play day and date, let us say, with your Paramount Hollywood, it would draw away patronage that you would otherwise get in the Paramount Hollywood? A. Yes.

Q. You believe that it is a good business practice, both for the distributor and for the first run exhibitor, to have that first run show case exhibitor have clearance over the theatres in the outlying districts?

Mr. Corinblit: Object to that, your Honor, as calling for a conclusion, speculation of the witness, and immaterial to this case.

The Court: I don't know. We have got a man here who, if he is not an expert, I don't know what an expert is in [1970] the motion picture business.

Mr. Corinblit: But we have had testimony on this point before, your Honor.

The Court: Objection overruled.

The Witness: Would you repeat the question, please?

(Question read.)

The Witness: On particular attractions. Sometimes it is better for the distributor if he has first run simultaneously in a lot of situations, because the picture, if it gets known in its first run show case as being an undesirable picture, can't sell so well in the subsequent runs.

(Testimony of Marco Wolff.)

Q. (By Mr. Mitchell): It is easier to fool the public, you mean, all at once?

A. All at once, speaking from the distributors' viewpoint.

Q. But on good pictures, it is good business to play it in a show case and have clearance over the outlying area, isn't it?

Mr. Corinblit: Your Honor, from the point of view of a distributor, I don't know how the witness could testify. Actually, of course, if one theatre has a big first run house, he would want clearance, but from the point of view of the distributor, I don't think the witness could answer.

The Court: Is that an objection? [1971]

Mr. Corinblit: Yes.

The Court: Objection overruled.

The Witness: I thought the question was about both distributor and exhibitor.

Mr. Mitchell: Would you read the last question, please?

(Question read.)

The Witness: Yes. It helps to advertise it for the outlying areas later. The first house that plays it alone has the edge that Cinerama has.

Q. (By Mr. Mitchell): And that returns a large film revenue to the distributor, doesn't it?

A. Yes. That is what we are returning at the Paramount Hollywood.

Q. Then a successful picture in the Paramount Hollywood means that the exhibitor in the subsequent runs, including your 21 day run at the Bald-

(Testimony of Marco Wolff.)

win, gets the advantage of the fame of the picture that has been established?

A. There is a definite advantage, yes.

Q. It is a definite advantage?

A. I would say so.

Q. You concede, do you not, Mr. Wolff, that the distributor has the right to determine how many subsequent runs he will offer in an area?

Mr. Corinblit: Object to that, your Honor, as calling [1972] for a conclusion, a concession as to a right, which is a question of law. It is a conclusion. I will object to that. It has nothing to do with expertise or expertness.

The Court: Overruled.

The Witness: I think the picture belongs to the distributor and as long as he treats everyone equally, I would say yes to that question.

Q. (By Mr. Mitchell): In this Inglewood area, let's assume a distributor who only wishes to license one run in this whole area from the Southside on the west to the Paradise on the east,—do you understand what we have called the Inglewood-Westchester area in this trial? Do you understand the area I am talking about? A. Yes.

Q. If that one picture played in the United Artists Theatre downtown in Inglewood, let us say, wouldn't it draw patronage from all parts—I think I gave you the wrong directions there. I guess the Southside is on the east and the Paradise is on the west. But wouldn't the United Artists playing ex-

(Testimony of Marco Wolff.)

clusive 7 day run draw patronage from over to the area of the Southside?

A. In a small degree, yes. It is quite a distance.

The Court: Are you talking about the United Artists in Inglewood?

Mr. Mitchell: Yes, sir. [1973]

The Court: All right.

The Witness: I would say there would be some patronage from the Southside district in a lessening degree as you go to the widest radius.

Q. (By Mr. Mitchell): There is really over in the Southside area quite a population center, isn't there, Mr. Wolff? A. Yes.

Q. Very much more of a population center than there is in the Westchester area?

A. No. I think the Westchester area is bigger, better.

Q. Back in 1950 and 1951 we are talking about.

A. Well, Westchester was pretty well developed by then, but I couldn't give you an accurate estimate.

Q. All right. The United Artists playing exclusive 7 day run would draw some from the Southside area and it would draw some from up in this Balboa Theatre area, wouldn't it?

A. Again only a small percentage from there.

Q. Around the circumference here it would draw some from the area up here to the northwest of Inglewood, wouldn't it, or northeast of Inglewood, I should say?

A. Again the same answer would be that I ear-

(Testimony of Marco Wolff.)

lier gave, that as the radius widened, it would be lesser. For instance, the Southside area, even if it had to follow the United Artists in downtown Inglewood, would still find many of its patrons waiting for the picture to get there. [1974]

Q. True, and some of them would already, in order to see the picture early, have gone to the United Artists?

A. I think a few, because the Southside is quite remote from downtown Inglewood.

Q. Just like when you run the exclusive first run in the Paramount Hollywood, it just draws a few people from Pasadena, a few people from Inglewood, a few people from other areas, isn't that right? A. That's right.

Q. In the same manner, the exclusive first run in Inglewood would draw some people from the Southside area? A. Some people.

Q. And some people from up in the northwest?

A. Yes.

Q. And some people from the Westchester area?

A. Yes.

Q. And some people down here toward Redondo, isn't that right?

A. That is possible, and likely.

Q. And likely, isn't it? A. Yes.

Q. And is so, isn't it? A. I think so.

Q. The accumulation of all these people drawn from all these areas is important in terms of revenue to the United [1975] Artists playing exclusive 7 day run, isn't that true?

(Testimony of Marco Wolff.)

A. Yes, although he would get more film rental if he played it simultaneously in several houses as the film companies have chosen to do.

Q. The film companies get more film rental on that one run if they play it in a lot of theatres, but they can also get more film rental from playing an exclusive 7 day run in the United Artists and then playing subsequent runs in the surrounding theatres? That is another way of doing it, isn't it?

A. Yes. I can't testify to that being a fact in that area. As long back as I remember they have never played one run as a matter of policy in the Inglewood area as widely as you refer to it, because there have always been several runs within my recollection.

Q. You know a man named George Hickey, don't you? A. Yes.

Q. Back in those days he was only playing one 7 day run in that area, wasn't he?

A. Not always.

Q. Well, you remember you were receiving pictures at the Southside back in those days no earlier than 21 days from Loew's, don't you remember that?

A. I remember our opening program was a 7 day availability from MGM. [1976]

Q. But your regular run of pictures was 21 days from Loew's, wasn't it? A. And 14, I think.

Q. And 14? A. I am not sure, but I think.

Q. They ran one 7 day availability?

(Testimony of Marco Wolff.)

A. I think Loew's had a different policy than several of the other companies.

Q. I think so, too. That is correct. Similarly, Mr. Wolff, if a company were to offer a single 7 day availability in this area and it were to play at the Southside Theatre, your theatre would draw patronage from all of this area to the west over to the Paradise, and from far to the east, isn't that true?

A. If it had an exclusive run for the entire area?

Q. Yes.

A. Yes, and the outer fringes, of course, in a lessening degree.

Q. Yes, and that is so in really a complete circle around the Southside?

A. That's right. [1977]

Q. So that the area of draw of patronage is affected by the question of whether there is one run, one seven-day run or two?

A. In varying degrees you are right, but it does affect it.

Q. Well, it affects it when your Southside, if it were deprived of the draw of all these outlying areas, that would be a considerable loss of gross, wouldn't it?

A. Yes, but we never had the privilege——

Q. Of losing that much gross?

A. Yes, but we never had the privilege of having the Southside on a seven-day availability without other theatres within four miles playing the

(Testimony of Marco Wolff.)

same picture at the same time. So I couldn't give you expert testimony on the result.

Q. All right. When a company puts in two seven-day runs in the area, the area of draw of patronage becomes a smaller circle, shall we say?

A. For each theatre.

Q. For each theatre.

A. It contracts it a little, depending on the proximity of the second theatre.

Q. That is right. Well, it really depends on a lot of things. It depends on the geography of the situation, doesn't it? A. Yes. [1978]

Q. And the theatre going habits of the public in the area? A. Yes.

Q. The question of whether a theatre is or is not in a city like that that has a business center.

A. (No response.)

Q. Would that have some effect on it?

A. Under certain circumstances, although some of the best theatres now are in the middle of an oil-field with no city around them, and they are doing bigger grosses than theatres in the middle of the business section.

Q. Like Baldwin Hills?

A. Or like the Vermont Drive-In.

Again I have to say that none of these are fast rules, because they differ under varying circumstances.

Q. All right. So if there were two seven-day runs being offered and one went to the Southside and one went to the Academy each of those would draw from

(Testimony of Marco Wolff.)

a large surrounding area—the circles would cross, wouldn't they? A. Yes, they would.

Q. The area wouldn't be as large as if there were a single exclusive seven-day run?

A. That is right.

Q. Now then, if you put in three seven-day runs—let us suppose a distributor were to license one seven-day run to [1979] the Southside, one seven-day run to the Academy, and one seven-day run to the Paradise, that would still further constrict these circles of draw, wouldn't it?

A. Depending on the circumstances, you are correct, although an outstanding picture would pack all three theatres.

Q. Yes, but there not too many outstanding pictures each year, are there, sir?

A. That is right.

Q. And you have to depend for your livelihood and the livelihood of your theatre upon the best pictures that the distributors can make, but not all of them are knock-outs, right?

A. I will concede that.

Q. All right. Now, as you put in additional—as the distributors put in additional runs what he is doing is dividing up to some extent the patronage of this large area among those runs?

A. Yes, although, of course, he would get a larger gross and therefore larger film rental out of the three simultaneous runs than he would out of two or one.

Q. If he put in—let us go to an extreme. There

(Testimony of Marco Wolff.)

are some nine theatres in this area exclusive of drive-ins.

If he were to put in a seven-day run in every one of those nine theatres he would just divide up the patronage among the theatres? [1980]

A. Each theatre would do less than if they had it alone, if that is what you mean.

Q. The distributor might get the same amount of money as he would in an exclusive run, right?

A. Or more.

Q. Or more. But the theatres would be badly hurt by that sort of thing, wouldn't they, nine simultaneous runs?

A. Nine seven-day runs in a contracted area, yes.

Q. So that the more runs you put in this area the less the theatres, the less well the theatres can do, isn't that really so?

A. I think so. [1981]

* * * * *

Q. (By Mr. Mitchell): Mr. Wolff, Warner Bros., through your negotiations with Mr. Herbel, licensed to you three pictures early in your operation of the Paradise. *Pretty Baby*, *Kiss Tomorrow Goodbye*, and *Tea For Two*; that's right, isn't it?

A. Yes.

Q. You didn't bid for those, you carried on a negotiation with Mr. Herbel?

A. Yes, with the exception of *Tea For Two*, I think he demanded a guarantee.

Q. Yes. Well, that is a negotiation, isn't it? I

(Testimony of Marco Wolff.)

mean whether you give a guarantee or don't give a guarantee is [1982] negotiation, isn't it?

A. Yes.

Q. And you negotiated, as distinguished from what you call bidding? A. Yes.

Q. Now, on the other Warner pictures that came off on the 7 day availability while you were operating the theatre, Warners offered you the opportunity to bid on *Breaking Point*—or would you like to have your recollection refreshed on that?

A. Well, I don't remember the individual pictures.

Mr. Corinblit: We don't have any quarrel with the fact that the pictures during the period Mr. Wolff was buying for the *Paradise Theatre* were offered for bidding.

Mr. Mitchell: All right. What I would like to have stipulated to, then, is that Warner offered to the *Paradise* for bidding the 7 day run on *Breaking Point*, *Three Secrets*, *Rocky Mountain*, *Glass Menagerie*, *Breakthrough*, and *West Point Story*.

Mr. Corinblit: And all of those played prior—

Mr. Mitchell: No, but they were offered during the time that Mr. Wolff was operating the theatre.

Mr. Corinblit: All right. We will stipulate to that, subject to correction as far as the last date.

Q. (By Mr. Mitchell): Now, those pictures that I have [1983] just named that were offered to *Paradise* on the 7 day availability, you did not win the bid on those pictures?

(Testimony of Marco Wolff.)

A. I think we did on Three Secrets.

Q. You think you played Three Secrets?

A. I think so.

Q. With respect to the other pictures, you played them on the 14 day availability, didn't you?

A. I don't remember that.

Q. I think I can refresh your recollection on that if I may have Plaintiff's Exhibit 45-J.

A. I am not sure we played Three Secrets on 7 or 14, I don't know which.

Q. I think you played all of those and I will refresh your recollection in a minute, on the 14 day availability, Mr. Wolff.

This exhibit, Mr. Wolff, is in evidence as the Paradise play-off of pictures, and I think if you will check, perhaps your recollection can be re-refreshed that starting with Breaking Point—well, let's come back to that in a minute—Three Secrets you played on the 14 day availability.

A. Yes, according to this schedule.

Q. You recall that? You recall playing it at the Paradise?

A. I recall playing Three Secrets, yes, sir.

Q. And Rocky Mountain on the 14 day. [1984]

A. Yes, sir.

Q. Glass Menagerie on the 14 day?

A. I think that was after we gave up the booking of the theatre.

Q. That played November 22nd to 28th. I think you were still there, weren't you?

(Testimony of Marco Wolff.)

A. I think we finished the first or second week in November. It is indicated on here, I think, where the cut-off came. I thought—we may have booked up to there, but I am sure we didn't officially have anything to say about the theatre beyond the first week of November.

Q. I see. All right. You were also given an opportunity during the period that you were operating or buying and booking for the Paradise to bid for the Metro 7 day pictures and the Universal 7 day pictures, isn't that true, also? Would you like to——

A. I am not sure about Metro 7 days.

Q. Perhaps I can refresh your recollection. How about Universal? Do you remember you received an opportunity——

A. I think we had the opportunity there, yes, sir.

Q. ——to bid on those pictures?

A. Yes, sir. [1985]

The Court: While you were buying and booking for the Paradise Theatre did you bid or did you refuse to bid?

The Witness: Whenever possible we tried to negotiate, but there were several occasions where we did bid.

The Court: You would rather negotiate than bid?

The Witness: Yes, sir.

The Court: If you couldn't negotiate, then you did bid?

(Testimony of Marco Wolff.)

The Witness: We made a number of bids.

The Court: You never refused to bid?

The Witness: We refrained from bidding on a number of pictures.

The Court: That is, you didn't want to put in a bid, but you never established the policy you wouldn't bid at all, did you?

The Witness: No, sir.

Mr. Corinblit: The plaintiff will stipulate that for the most part, and we don't know of any exceptions, the Metro product was offered for bidding on a seven-day availability to the Paradise.

We had previously told Metro we wanted to negotiate and they refused and requests for offers were sent.

Mr. Mitchell: Requests for offers were sent during the period Mr. Wolff bought and booked.

Mr. Corinblit: We will stipulate that that is substantially true. [1986]

Mr. Mitchell: We will accept the stipulation.

Q. (By Mr. Mitchell): Now, Mr. Wolff, during the period 1950 when you were representing the Paradise Theatre, the main east and west arterial street in the vicinity of the Paradise Theatre was Manchester Boulevard, is that correct?

A. Yes.

Mr. Mitchell: I would like to point that out to the jury.

Q. (By Mr. Mitchell): The Paradise Theatre is located here on Sepulveda and Manchester Boule-

(Testimony of Marco Wolff.)

vard runs from Sepulveda easterly through Inglewood out past the Academy and Fifth Avenue Theatre, which are both fronting on Manchester and so on.

By the way, I see out here at Broadway and Manchester there is a theatre called "Manchester Theatre." That is one you operated also, was it not?

A. Yes, sir.

Q. I think that wasn't mentioned this morning.

Now, in addition to the Academy and the Fifth Avenue being located on Manchester, the Fox in Inglewood and the United Artists were both within a block or two of Manchester Boulevard.

A. That is correct.

Q. And the ease of transportation between the Westchester area where the Paradise is located, and downtown [1987] Inglewood and the Academy and Fifth Avenue would be a factor in tending to increase the degree of competition between theatres in the Westchester area and theatres in downtown Inglewood and the Academy and Fifth Avenue, isn't that correct? A. Yes.

Mr. Mitchell: That is all.

Mr. Johnston: I have no questions of this witness.

Redirect Examination

Q. (By Mr. Corinblit): In the last questions of Mr. Wolff I don't think Mr. Mitchell asked you where the United Artists Theatre is located—what street in Inglewood is it located on?

(Testimony of Marco Wolff.)

A. On Market Street.

Q. Inglewood? A. Inglewood, yes.

Q. Is there a cemetery anywhere in that area?

A. The cemetery is beyond Inglewood, between Inglewood and the Academy Theatre and the Fifth Avenue.

Q. How about the other direction? Is there a cemetery or some other wide-open space between downtown Inglewood and coming toward Sepulveda?

A. There was at that time a large undeveloped area.

Q. Between Inglewood and coming toward Sepulveda? [1988] A. That is right.

Q. Is there a railroad track in that area, too?

A. Yes.

Q. Between Inglewood and coming back toward Sepulveda? A. Yes.

Q. Mr. Mitchell asked you a little bit about first run, Mr. Wolff.

The Court: First run?

Mr. Corinblit: First run Los Angeles. There were questions asked about first run Los Angeles, your Honor, general policy questions.

Q. You are aware, are you not, Mr. Wolff, that in the last two or three years all of the distributors have adopted the multiple day and date policy, is that correct?

Mr. Mitchell: That is a leading question and it

(Testimony of Marco Wolff.)

isn't quite correct and I think the witness—anyway, it is not proper cross examination.

The Court: I think it is proper examination. You opened up the subject. The objection is overruled.

The Witness: Yes, I believe all the distributors are playing the majority of their pictures now on a multiple policy of first run, sometimes from 10 to 20 first run day and date.

Q. (By Mr. Corinblit): Now, having in mind the total number of pictures distributed—I will withdraw that. [1989]

Having in mind the total number of pictures that are sold on the multiple day and date first run policy, as far as the distributors are concerned, is it what you would say—what would you say as to most of the product, as to whether it is good business to play on a multiple day and date as compared with playing an individual house first?

A. Well, the distributors often tell me how much money they can get on a day and date when I tried to get it for an exclusive run. [1990]

Q. (By Mr. Corinblit): You have an example of that now——

The Court: Does he tell you how much he can get if he wants multiple runs?

The Witness: That is what he tells me, he can get a lot more money on a multiple run.

The Court: Does he tell you he can a lot more money on a exclusive run sometimes?

(Testimony of Marco Wolff.)

The Witness: When we are able to get exclusive, it is because they are satisfied that particular picture is worthy of that kind of run and it will have a long run in our Paramount Hollywood Theatre.

Q. (By Mr. Corinblit): If you were to talk in terms of percentage on the matter of exclusive runs compared to the multiple day and date runs, that would be what percentage that would be applicable to the multiple day and date?

A. You mean how many pictures play multiple as against those that play exclusive?

Q. Yes.

Mr. Mitchell: What is the basis for this? There are four defendants in this action, your Honor, and Twentieth Century-Fox, five distributor defendants. Four I represent and one is represented by Mr. Johnston. Now there is a broad general question which I object to.

The Court: What are you trying to [1991] establish, Mr. Corinblit?

Mr. Corinblit: Trying to establish, your Honor, between 90 and 95 per cent of the pictures are multiple day and date pictures, and the only exclusive situation——

The Court: You mean now?

Mr. Corinblit: Yes, sir.

The Court: 1956, or——

Mr. Corinblit: First I will establish now and then we will establish it was a fact that back in 1950 and 1951 the same was true as far as exclusive.

(Testimony of Marco Wolff.)

The Court: Maybe counsel will agree with you.

Mr. Corinblit: Fine.

The Court: That it is the policy of the distributors now to distribute their pictures on multiple runs, rather than single run, the policy for general pictures.

Mr. Corinblit: Yes, sir.

The Court: Won't you stipulate that?

Mr. Mitchell: That is not true, your Honor. The distributors' policies are different with respect to first run now and you can't generalize. There are a great many multiple first runs shown by some of the distributors, and some, like Paramount, show *hardly* of their pictures on multiple first run, so you just can't generalize. Each distributor sells his type of picture in the way he thinks best. [1992]

The Court: I will sustain the objection. You reduce it to each distributor, then, rather than lumping them all together.

Mr. Corinblit: Well, your Honor, we have read into evidence from 1950 and '51 the number of pictures that played on multiple day and date policy, so I think if Mr. Mitchell wants to break it down, I have already done it with the specific pictures, so it is not necessary to break it down with this witness.

Q. Mr. Wolff, looking back at 1950-1951 and prior thereto, let's say 1945 to 1951, none of the companies, except with rare exceptions as to pic-

(Testimony of Marco Wolff.)

tures, had in effect any exclusive first run policy, isn't that correct?

Mr. Mitchell: Your Honor, this sounds like cross examination. This is his own witness. He is cross examining him. The questions are leading and suggestive. He should be required to ask proper questions. I object on that ground.

Mr. Corinblit: I will withdraw the question.

Q. Mr. Wolff, do you remember what was the situation with respect to the single theatre long run exclusive policy back in 1950 and 1951?

Mr. Mitchell: With respect to what distributor, your Honor?

Mr. Corinblit: With respect to any exhibitor in the Los Angeles area first run. [1993]

The Court: Mr. Corinblit, unless you assume that all the distributors had an agreement among themselves in which they followed the same policy, then your question is too broad, because I think the evidence is that the distributors had different policies.

Mr. Corinblit: Not with respect to this question of an exclusive run, your Honor. As a matter of fact, that question——

The Court: Didn't Fox back in those days have a multiple run?

Mr. Corinblit: Yes, sir.

The Court: You included all the companies.

Mr. Corinblit: Yes.

Mr. Mitchell. So did Universal, your Honor.

The Court: If you want to break it down into

(Testimony of Marco Wolff.)

the particular companies, you can do that, because I think the companies contend, and I think there is some evidence to sustain their contention, that they didn't follow the same policy, that each had an individual policy.

Mr. Corinblit: With respect to this question, your Honor, as to having exclusive, one theatre exclusive, you will not find, your Honor, any company using that policy.

The Court: Well, ask the witness about the individual companies, rather than putting them all in the same basket. [1994]

Mr. Corinblit: Fine.

Q. With respect to Loew's, Mr. Wolff, do you remember back in 1950 and 1951, did Loew's have the policy of exclusive first run? A. No.

Q. With respect to Paramount, do you remember back in 1950 and 1951 that Paramount had the policy of exclusive first run? A. No.

Q. With respect to Twentieth Century-Fox, did Twentieth Century-Fox have a policy of exclusive first run? A. No.

Q. With respect to Universal, did Universal have the policy of exclusive first run in 1950 and 1951? A. No.

Q. With respect to RKO, did RKO have a policy of exclusive first run? A. No.

Q. With respect to Warner, did Warner have a policy of exclusive first run in 1950 and 1951?

A. No.

(Testimony of Marco Wolff.)

Q. With respect to Columbia, did Columbia have a policy of exclusive first run? A. No.

Q. With respect to United Artists, did United Artists [1995] have a policy of exclusive first run?

A. No.

Mr. Mitchell: Now, your Honor——

The Witness: May I modify this answer with this statement?

Mr. Corinblit: Yes.

The Witness: Occasionally there was an unusual picture, a Ten Commandments of that day, that might have a long run at the Carthay Circle, or a theatre of that type, an occasional picture, once in a great while.

Mr. Corinblit: That is the kind of picture described by Mr. Hickey as the problem picture, your Honor.

Mr. Mitchell: That is no problem picture. There is no problem about The Ten Commandments.

The Court: May I ask this witness a question?

Will you please explain to the jury what you mean by an exclusive first run in 1945 to 1951? What do you mean?

The Witness: My answer was to the question, was there an exclusive first run, and it was based on my understanding of one picture in one theatre only at the same time with no other theatre.

Mr. Mitchell: Over what kind of a period?

The Witness: Over a long run period, many weeks or several months. Of course, many years

(Testimony of Marco Wolff.)

ago, you might recall that the Egyptian had pictures which ran six or eight [1996] or 10 months, and for a time there were one or two other theatres that had what is called an exclusive first run, but in 1950 and 1951, as I recall, it was not the policy of any company. There may have been an occasional picture which I can't place at this moment.

Mr. Mitchell: Your Honor, I think that there is confusion here that might just as well be cleared up because there is no dispute. A policy of playing downtown and Hollywood day and date has never been called multiple first run policy that I ever heard of. When counsel asks those questions the way he does, he tends to infer that in those days there was not this show case policy, which is completely contrary to the fact. I think it would be well to clear it up right now. There were multiple first runs used by Twentieth Century-Fox and Universal, and others used two and three theatres in downtown and Hollywood.

The Court: Let me ask the witness a question. You operated the Paramount Downtown and the Paramount in Hollywood.

The Witness: Yes, sir.

The Court: Played day and date.

The Witness: Yes, sir.

The Court: Did you consider that a multiple first run?

The Witness: I consider that is a dual [1997] first run, but in answer to his question, there was

(Testimony of Marco Wolff.)

no first run exclusive at that time that I knew of in one theatre.

The Court: If you had the right to play Paramount pictures in downtown Los Angeles and Hollywood, wasn't that exclusive first run for those theatres?

The Witness: We had thought so, but I think in your court it was decided it was not exclusive.

The Court: You contended it was exclusive.

The Witness: I don't think we contended it in the courts, your Honor, but we thought it was, but they took pictures away from us and we didn't have an exclusive in those two theatres.

The Court: You played the pictures in downtown and in Hollywood.

The Witness: One downtown Los Angeles and one in Hollywood.

The Court: Would you consider that a first run?

The Witness: In those two theatres, yes.

The Court: Was it a dual first run?

The Witness: It was in those two theatres.

The Court: In two theatres.

The Witness: Yes, sir.

The Court: You just got through testifying not one of the exhibitors had such a policy.

Mr. Corinblit: Oh, no, your Honor. [1998]

The Witness: I was referring to one exclusive theatre.

The Court: One theatre?

The Witness: When you asked me to define it

(Testimony of Marco Wolff.)

to the jury, that is the way I attempted to define it. The answer to the question that I gave was intended to answer the question referring to was there one theatre playing pictures from any company exclusively in one theatre with no other theatres playing day and date with it. My answer is no to that.

Q. (By Mr. Corinblit): There is another part, too, Mr. Wolff. In Mr. Mitchell's definition of first run when he was asking the questions, he was talking about a long period. There was no company except with rare exceptions that had that policy in 1950 and 1951, is that right?

A. That is my answer.

Mr. Mitchell: Can't we have a proper question asked by counsel? He makes a statement and then turns around and asks a leading question so that the witness knows what to answer.

The Court: Maybe that is a sign of a good attorney.

Mr. Mitchell: I think that is overreaching. I think it should be stopped.

Mr. Corinblit: I object to Mr. Mitchell's statement that there is any overreaching here. [1999] It is Mr. Mitchell that used the language without their getting a definition in advance.

The Court: Just a minute.

Mr. Corinblit, you are going too far, and this witness, you know, is an expert witness.

Mr. Corinblit: Yes, sir.

(Testimony of Marco Wolff.)

The Court: He is perfectly capable of understanding your questions and answering them. [2000]

Q. (By Mr. Corinblit): Now, Mr. Wolff, referring to Mr. Mitchell's example of the seven-day period, Mr. Mitchell asked the question with respect to the seven-day availability at United Artists Theatre in Inglewood, and if this is deemed to represent the United Artists Theatre in Inglewood, Mr. Mitchell drew a circle of the drawing area and pointed out that there were—that it would draw a certain amount from each peripheral area.

Now, if a theatre—if instead of selling one exclusive run to United Artists the company put another run in this area, what in your opinion would happen to the total drawing area of seven-day availability in the two theatres?

A. Well, the drawing area would be increased at least by 50 per cent.

Q. In other words, instead of the drawing area—you would say it would at least be——

A. Maybe three-quarters.

Q. Right, or maybe three-quarters, and if the same thing happened on this end the same thing would be true, is that right? A. Yes, sir.

Q. The drawing area would be out three-quarters. A. Yes, sir.

Q. So the total drawing area is now represented by the larger circle for seven days as distinguished from the [2001] smaller circle?

A. Yes, sir.

(Testimony of Marco Wolff.)

Q. And what effect does that have on the film company—what the film company is going to get?

A. It wouldn't multiply it by 3, but it would approximate between $2\frac{1}{2}$ or $2\frac{3}{4}$.

Q. Suppose, for example—in other words, if the gross of the first theatre on the exclusive run was \$4,000 and the film rental paid on a basis of \$4,000, with three runs the gross would be what, taking your example?

A. Well, I would roughly expect it to be not less than \$10,000 on a good picture. If it was a super picture it could be three times \$4,000.

Q. Now, the same analysis that you have made here applies even to, in many respects, to the first run, does it not?

Mr. Mitchell: I object to the question as leading and suggestive. It is the same thing.

Mr. Corinblit: I will withdraw the question.

Q. In terms of the gross receipts that the film companies receive for first run on a multiple day and date as compared—on 90 to 95 per cent of the pictures, as compared to some of the few other pictures that are played exclusively, do you have any information as to what the comparisons of gross receipts— [2002]

Mr. Johnston: I object to that. There has been no foundation laid, your Honor, and it calls for conclusions and speculation of the witness.

The Court: I will sustain the objection. [2003]

* * * * *

(Testimony of Marco Wolff.)

Mr. Corinblit: Yes, that is correct.

Q. (By Mr. Corinblit): One other question, Mr. Wolff.

It has been shown in this case that on occasion the Southside Theatre in part of its advertising would have the word “play” or “come early”—the Southside Theatre or the Rio Theatre. What did those terms mean when used in advertising?

Mr. Mitchell: I object to that as being improper redirect examination.

The Court: Sustained. There wasn't one word about that in the direct examination.

Mr. Corinblit: All right. Mr. Mitchell doesn't want that information. There are no further questions.

Mr. Mitchell: That isn't quite proper, your Honor. That is overreaching.

The Court: Yes, and the jury is instructed to disregard the statement of counsel.

Mr. Mitchell: And it shouldn't have been said, should it, your Honor?

The Court: I ruled it out, Mr. Mitchell.

Mr. Mitchell: I want to ask this witness [2007] a few questions about his circles.

Recross Examination

Q. (By Mr. Mitchell): Now, Mr. Wolff, Mr. Corinblit had you talk about three theatres. I believe he called this the United Artists. I don't know whether he gave this a name, but let us give

(Testimony of Marco Wolff.)

it the name of the Paradise. It is over this way, isn't it, over to the west? A. (No response.)

Q. Here is the United Artists and the Paradise over here this way, and let us call this the Academy over here.

Now, you say that playing alone the drawing area of the United Artists Theatre would be the circle with the United Artists at the center of it.

A. That is the immediate playing area.

Q. The immediate drawing area.

A. Yes.

Q. You don't mean "playing area". You mean "drawing area". A. That is what I mean, yes.

Q. They also draw from farther out, do they not? A. That is right.

Q. Of course? A. Yes. [2008]

Q. And then if you add two more seven-day runs, one to the Paradise and one to the Academy, then the drawing area of the Paradise becomes the principal drawing area, becomes a circle around the Paradise, is that right?

A. That is right. I don't think it would include the United Artists, though, in that particular circle.

Mr. Corinblit: Because the board is too small.

Mr. Mitchell: You would have to have the circle a lot smaller.

The Witness: That is right. Those are not good drawings.

Q. (By Mr. Mitchell): I am just taking the drawings the way he has them.

And your Academy—in fact, I am cutting them

(Testimony of Marco Wolff.)

down a little bit. Your Academy would draw in this direction, wouldn't it?

A. Yes. Likewise that shouldn't include the United Artists.

Q. Well, how far over do you think—let us draw a new set of circles your way. How far over do you think—we will make them a little smaller so we won't have any trouble. Here is your Paradise and here is your Academy. How far over do you think they would draw?

A. Well, the distance between the Academy and the Paradise is about six miles, isn't it? [2009]

Q. But this morning, Mr. Wolff, you told me that the United Artists playing alone would draw from a very large area, isn't that right?

A. Of course, but increasingly less as the circle widened, but I would divide it—if you want me to help you with your geometry there.

Q. What you are saying now is that each one would be a circle about like that?

A. Say about halfway between.

Q. Now, what you have done is to take the United Artists drawing area on a single seven-day run and divide it into these three parts.

Mr. Corinblit: Oh, no, no.

Q. (By Mr. Mitchell): Isn't that true?

A. Are you designating the outward area as the Academy?

Q. Yes.

A. To my recollection they never would play the Academy with downtown Inglewood.

(Testimony of Marco Wolff.)

Q. You mean playing clearance over downtown Inglewood? A. Usually.

Q. That means that somebody thought that downtown Inglewood drew from the Academy, drew from the Academy customers and the Academy drew Inglewood customers. [2010]

A. Less than two miles apart, but they would let us play at the Southside or let the Imperial play it, which was farther away than downtown Inglewood, four or five or six miles.

Q. What I am getting at is this. When you put in three day and date runs, while you increase to some extent the drawing area, you also cut up the patronage, don't you?

A. In a very small degree, because I can give you actual figures on that.

Q. And split it among the three theatres, right?

A. The split is, peculiarly enough, only very small because we had the experience of knowing—take *Born Yesterday* which played the Southside, the La Tijera and the Imperial and the Paradise and did well in all of them. That was four and not three. And some of those theatres were two miles apart.

Q. What do you think is a good gross in the Southside on a topnotch picture like *Born Yesterday* per week?

Mr. Corinblit: I object to the question. It is improper recross. That matter wasn't gone into. The plaintiff was restricted, and I object to it on that ground.

(Testimony of Marco Wolff.)

The Court: He is trying to find out what the witness meant by these circles. I assume that is what it is for, is that right?

Mr. Mitchell: Yes. [2011]

The Court: Overruled.

The Witness: We would be satisfied with \$4000 for the first week.

Q. (By Mr. Mitchell): Satisfied with that amount for an absolutely topnotch picture like that?

A. For a first week. I think that picture probably did a little more than that—probably \$4500.

Q. What do you really think you should get for the first two weeks for a topnotch picture like that?

Mr. Corinblit: Object to that as being speculative.

The Court: Objection overruled.

The Witness: That picture ought to do \$7000 in two weeks.

Q. (By Mr. Mitchell): No more than that?

A. We would be satisfied with \$7000. We may have done more but that would be profitable. [2012]

Q. (By Mr. Mitchell): Let me ask you, that *Born Yesterday* was one of the very top pictures of the year, correct?

A. It was among the top 25 or 30, I imagine.

Q. It was a lot better than that, wasn't it, Mr. Wolff?

A. I don't think so.

Q. It was among the top two or three, wasn't it?

A. No, I don't think so. I would have to get the surrounding pictures of that particular year, but

(Testimony of Marco Wolff.)

there are usually about 25 top pictures a year that are made.

Q. If you had been able to play *Born Yesterday* alone at the Southside exclusively, you could have run that profitably for a large number of weeks on a 7 day availability, if they would let you have it, couldn't you?

A. Probably a third week instead of a second.

Q. You could run it longer than that.

A. We never ran a picture more than two weeks at the Southside.

Q. As a matter of policy?

A. No. They haven't held up strongly enough on the second week to justify considering a third.

Q. After you play a four run play-off, like they tried to do on *Born Yesterday*, for a period of two weeks in the theatres, then that picture isn't worth very much to the 14 or 21 day availabilities in that area, is it?

A. I would have to look at the books to see what the [2013] actual facts were. I knew that specific picture. I wouldn't want to hazard a guess. I knew what it did on the first run, I thought I recalled.

Q. Wouldn't you think after it has played four theatres on the 7 day run day and date in the area for two weeks, it wouldn't be worth too much on the 14 and 21 day availability in that area?

A. It would be worth less than if it only played one week, but it happens a good picture has a longer life than a poor picture has. A poor picture could play one week without good business, where a good

(Testimony of Marco Wolff.)

picture still does good business on the 7 and 14 and 21 day availabilities.

Q. And if you take a poor picture and play four 7 day runs on that, none of the theatres will do a good business, will they?

Mr. Corinblit: I object to that, your Honor, as calling for speculation and conclusion. Good business? Bad business? He doesn't know what Mr. Mitchell is talking about.

The Court: I assume as soon as the news is spread around that there is a poor picture, your attendance will drop off.

Mr. Corinblit: That's right.

The Court: Regardless of the theatre or the picture. [2014]

Q. (By Mr. Mitchell): So that no theatre will do any business?

A. That's right. On bad pictures, the public is informed without telling them, in some way. They don't come to a bad picture.

Mr. Mitchell: I think that's all, your Honor.

Redirect Examination

Q. (By Mr. Corinblit): Mr. Wolff, for your own information, Mr. Mitchell didn't show you the figures he had here. You stated you thought you ought to do \$7,000 business at the Southside. That is what you did, \$7,000 in two weeks, and the Paradise did \$6,700, and the La Tijera \$6,000.

Mr. Mitchell: Just a minute.

Mr. Corinblit: I have no other questions.

(Testimony of Marco Wolff.)

Mr. Mitchell: While you are arguing the thing, I think we should call attention to what the Fifth Avenue did on a 7 day run with a Universal picture of similar quality, King Solomon's Mines.

The Court: Are you trying to educate the witness or educate the jury?

Mr. Mitchell: Well, I am trying to meet Mr. Corinblit's argument.

Mr. Corinblit: I was trying to inform the jury of [2015] something Mr. Mitchell had in his hand but didn't show.

The Court: Suppose we proceed with the cross examination or redirect examination of this witness. He has some theatres he wants to run, and I suppose he would just as soon be on his way. Do you have any more questions?

Mr. Mitchell: No, I don't have any questions.

The Court: Any more questions, Mr. Corinblit?

Mr. Corinblit: No.

The Court: You may be excused.

(Witness excused.)

The Court: Call your next witness.

Mr. Corinblit: The plaintiff will call Mr. Syd Lehman.

SYDNEY LEHMAN

called as a witness herein by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you please state your name?

The Witness: Sydney, S-y-d-n-e-y, Lehman, L-e-h-m-a-n.

The Court: You will have to speak up so that the jury can hear you.

The Witness: Yes, sir. [2016]

Direct Examination

Q. (By Mr. Corinblit): Mr. Lehman, what is your business?

A. I am in the business of buying and booking motion pictures for independent theatres.

Mr. Mitchell: Can't hear the witness, your Honor.

Q. (By Mr. Corinblit): You will have to speak a little louder, Mr. Lehman.

A. I am in the business of buying and booking motion pictures for independent theatres.

Q. The organization that you are connected with is Exhibitors Service, is that right? A. Yes.

Q. That organization has something to do with buying and booking pictures for the Paradise Theatre, isn't that correct? A. Yes.

Q. Approximately when did you take over the job of buying and booking for the Paradise Theatre?

A. I believe it was the latter part of December 1950.

(Testimony of Sydney Lehman.)

Q. You did the buying and booking for the Paradise from that date on to this very day, is that correct? A. Yes.

Q. In your capacity as buyer and booker for the Paradise Theatre, beginning December 1950, did you have any conversations [2017] with any representatives of the defendants in this case, the distributors, in order to get motion pictures for the Paradise Theatre? A. Yes, I did.

Q. Did you have any conversation with a representative of Warner Bros? A. Yes, sir.

Q. When did you have such a conversation?

A. I believe it was during either the last week in December of 1950 or the first week in January 1951.

Q. With whom did you have that conversation?

A. Mr. Fred Greenberg, the branch manager, and Mr. Frank Reimer, the sales manager.

Q. Referring to Mr. Greenberg of Warner Bros., did you have a conversation on the telephone or face to face, do you remember?

A. I don't recall.

Q. All right. What was said by you and what was said by Mr. Greenberg?

A. Well, I told him that we wanted—that we were representing the Paradise Theatre and that we wanted his product first run in the Westchester area.

He told me I couldn't get it.

Q. By first run in the Westchester area, what

(Testimony of Sydney Lehman.)

were you talking about, what availability in terms of Los Angeles? [2018]

A. Day and date with Warner Bros. downtown, Hollywood, and so forth.

Q. After he told you you couldn't have first run pictures, did you talk to him in the same conversation about anything else for the Paradise Theatre?

A. Yes. When I was convinced he wouldn't give me any first run pictures, I asked him if he would negotiate with me on 7 day pictures.

Q. What did Mr. Greenberg say to that?

A. He told me that I would have to bid for the 7 day pictures and that he would not negotiate with me for them.

Q. With respect to bidding, did he indicate the theatres that you had to bid against in order to get the pictures from Warner Bros. on 7 day?

A. Well, as far as I recall, they were all the theatres in Inglewood, and I believe the Southside, as well.

Q. By all the theatres in Inglewood and the Southside, you mean the Southside, Academy, Fifth Avenue, Imperial, Rio, Fox, United Artists, and including the La Tijera as well, is that right?

A. Yes.

Q. What did you say to him with respect to his requirement that you bid against all of these theatres in order to get the pictures on 7 days?

A. I told him it was my contention we were not in competition [2019] with any of those theatres and that I wouldn't bid for the pictures.

(Testimony of Sydney Lehman.)

The Court: That is, you would not bid on the 7 day availability?

The Witness: Yes, sir.

Q. (By Mr. Corinblit): Was there anything more, Mr. Lehman, that Mr. Greenberg said at that time? A. Nothing that I recall.

The Court: Has that been your policy ever since, that you haven't bid on 7 day availability?

The Witness: You mean from then until now?

The Court: Yes.

The Witness: We have bid on some pictures recently.

The Court: How about to 1951, August 1951?

The Witness: No, sir, we did not bid on any 7 day pictures up to August 1951.

The Court: We are talking about Warner Bros. now.

The Witness: Yes, sir.

Q. (By Mr. Corinblit): In March 1951 the distributor Columbia, you licensed from Columbia a 7 day availability on the picture *Born Yesterday*, is that right? A. Yes, we did.

Q. That was day and date, as shown here, with the *La Tijera*, the *Imperial* and the *Southside*?

A. Correct. [2020]

Q. After you played the picture, Mr. Lehman—I will withdraw that.

I will show you Plaintiff's Exhibit 10-U for identification, a copy of a letter, and ask you whether or not this letter was sent by you to Mr. Greenberg.

A. Yes, I sent that letter.

(Testimony of Sydney Lehman.)

Mr. Corinblit: We will offer Plaintiff's Exhibit 10-U in evidence.

The Court: Does counsel want to look at it?

Mr. Corinblit: I think they know what it is.

The Court: In evidence.

The Clerk: 10-U.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit 10-U.) [2021]

* * * * *

Q. (By Mr. Corinblit): Now, subsequent to this letter, which is dated March 26, Mr. Lehman, did you have a conversation with Mr. Greenberg or conversations with Mr. Greenberg about the picture *Lullaby of Broadway*? A. Yes, I think I did.

Q. And do you remember approximately when that conversation took place?

A. No. That would be very hard to recall, but do I have a memorandum on that? Do I have a memorandum referring to my conversation?

Q. Yes. I will show you Plaintiff's Exhibit 10-W, which is a memorandum—I will first ask you to identify it. Is this a memorandum of the conversation you had with Mr. Greenberg shortly after it took place? A. Yes.

Q. And that is dated when?

A. March 30, 1951.

Q. All right. Now, do you recall what you stated to Mr. Greenberg and what he said to you in that conversation?

A. Without referring to the memorandum?

(Testimony of Sydney Lehman.)

Q. Do you recall without referring to it?

A. No.

Q. I will ask you to examine your memorandum and state whether or not this refreshes your recollection as to your conversation with Mr. Greenberg. You may look it over. [2023]

A. Yes.

Q. All right. Now, will you state, does that refresh your recollection as to what the conversation was?

A. Yes, sir.

Q. Will you state to the jury what the conversation was?

A. I talked to Mr. Greenberg and asked him if we could play *Lullaby of Broadway* on the 7 day availability at the Paradise Theatre. He informed me that the picture was playing on a 7 day availability in four houses in the area. I then asked him why we couldn't play day and date with those theatres, and he informed me that for some reason or other we couldn't play it, couldn't play day and date with these theatres, but he would discuss the same with his district manager, Henry Herbel, who at that time was en route to Los Angeles and he would let me know.

Q. After that conversation did you have a further conversation with Mr. Greenberg?

A. Yes, I did.

Q. Do you remember the date of the conversation?

A. Well, it was either the next day or not more than 48 hours later.

(Testimony of Sydney Lehman.)

Q. Now, what was said—do you remember what was said at that time?

A. Well, I think there is a memorandum on that, too, but I recall that I was constantly telephoning him trying to [2024] Mr. Herbel's reaction to what he was going to talk to him about—that is, Lullaby of Broadway, because in the first phone conversation it was left like that, that he was going to discuss it with Herbel and see if we could get the picture.

Q. Do you recall anything further about that conversation?

A. I know we didn't get the picture.

Q. Well, just to complete the conversation, do you recall anything further about it?

A. I don't recall it exactly, but if there is a memorandum there, I could refer to it.

Mr. Johnston: May I see the memorandum?

Mr. Corinblit: Yes. It is Plaintiff's Exhibit 10-X.

Mr. Johnston: Thank you.

Q. (By Mr. Corinblit): I will show you a document which has been marked Plaintiff's Exhibit 10-X, Mr. Lehman, and ask you whether or not you prepared this memorandum shortly after the conversation with Mr. Greenberg? A. Yes.

Q. All right. Does this refresh your recollection as to the date? A. Yes, April 6, 1951.

Q. You had this typed up and dated as of that time, is that right?

A. Well, it was typed immediately on that day.

(Testimony of Sydney Lehman.)

Q. Now, would you state to the jury whether this refreshes your recollection and what you now recall the conversation was?

A. Well, I talked with Fred Greenberg again but as of that date, April 6, 1951, he had not talked to Henry Herbel, and I informed him that we grossed \$8700 on *Born Yesterday* and that I felt we could as well on *Lullaby Of Broadway* as we did on *Born Yesterday*. And I offered to let him write his own deal on the picture, especially inasmuch as he had informed that *Lullaby Of Broadway* was going to play the Southside, the Imperial and the La Tijera Theatres, which were the same theatres as we played day and date with *Born Yesterday*, but that was held in abeyance, and he would do nothing until he talked to his district manager, Mr. Herbel.

Q. All right. Now, subsequently, did you have another conversation with Mr. Greenberg?

A. Yes, I did.

Q. And do you remember when that took place?

A. It must have taken place within 24 or 48 hours after the previous conversation.

Q. And do you remember what was said in that conversation?

A. Well, I do, but I know I have a memo on that.

Q. I will show you Plaintiff's Exhibit 10-Y for identification. [2026]

(Handing document to Mr. Johnston.)

(Testimony of Sydney Lehman.)

Q. And ask you whether or not you caused to be prepared or dictated this memorandum shortly after the conversation took place? A. Yes.

Q. And I will ask you whether or not this refreshes your recollection as to the conversation?

A. Yes.

Q. Now, will you state to the jury what you said and what Mr. Greenberg said?

A. Well, I talked to Mr. Greenberg again. He informed me that he talked to Mr. Herbel, his district manager, and Herbel refused to let us play the picture. I told Greenberg that I couldn't see why, and I argued with him, and finally he informed me that originally Fox had won the bid on the picture, but due to certain clearances that Fox demanded, Warners were unable to give them the picture and therefore Warners sold it to the La Tijera, the Imperial and the Southside and the Balboa, but that he wouldn't do anything as far as giving the picture to the Paradise was concerned.

Finally he said to me, "You and I can talk about this all day long. I am not going to give you the picture. If you want to go over my head and see Henry Herbel, go ahead, but you are not going to get the picture."

The Court: Mr. Corinblit, I noticed it is [2027] 3:00 o'clock, and before we get into another subject, we will take our afternoon recess.

We are about to take another recess, ladies and gentlemen, and again it is my duty to admonish you

(Testimony of Sydney Lehman.)

not to discuss this case with anyone, you are not to permit anyone to discuss it with you and you are not to formulate or express any opinion as to the rights of the parties until the matter has been finally submitted to you.

With that admonition, we will now recess until 3:20 o'clock this afternoon.

(Short recess.) [2028]

The Court: Stipulate the jury is present in the box?

Mr. Corinblit: So stipulated, your Honor.

Mr. Mitchell: Yes.

The Court: You may proceed.

Q. (By Mr. Corinblit): I will show you Plaintiff's Exhibits 10-Z and 11-A, Mr. Lehman, and ask you whether you sent 10-Z to Mr. Greenberg on April 4th and whether you received 11-A from Mr. Greenberg on or about April 5th. A. Yes.

Mr. Mitchell: May I see those, please?

Mr. Corinblit: Yes.

The Court: They may be received in evidence.

The Clerk: 10-Z and 11-A.

(The exhibits referred to were received in evidence and marked as Plaintiff's Exhibits 10-Z and 11-A.) [2029]

* * * * *

Q. (By Mr. Corinblit): Calling your attention to the date of approximately April 12, 1951, do you remember having a further conversation with Mr. Greenberg with respect to the Paradise Theatre and

(Testimony of Sydney Lehman.)

clearance on the matter of Lullaby Of [2030] Broadway? Did you have such a further conversation?

A. I may have, but I would have to be refreshed before I could be certain.

Q. I will show you a document which has been marked 11-D-1, Plaintiff's exhibit for identification, and ask you whether you had this prepared, dictated and prepared, shortly after such a conversation with Mr. Greenberg. A. Yes.

Q. All right. Do you recall now that you did have such a conversation? A. Yes, I did.

Q. And the date was the date of Monday, April 12, 1951? A. Yes.

Q. Would you state to the jury what you said to Mr. Greenberg and what Mr. Greenberg said to you?

A. Well, I still continued to talk to him about Lullaby Of Broadway, and he informed me that the La Tijera Theatre had purchased the picture with clearance over the Paradise Theatre. Naturally I couldn't go along with the idea, because the La Tijera Theatre played Born Yesterday day and date with the Paradise Theatre, and they did a pretty good business on the picture, and there was no reason why they couldn't do the same thing on Lullaby Of Broadway, because this was, in my estimation, a triple A picture and was entitled to do very good business in both theatres. [2031]

(Testimony of Sydney Lehman.)

Now, Greenberg said that he just couldn't do anything about it.

And then I talked to him about his next release, Sugarfoot, which was available on a 7 day availability on the 18th of April. I told him that we had already bought a picture for the 18th of April and in the event that his bids were rejected for the 14 day availability, which would be 7 days later, whether we could negotiate for the picture.

He said yes, we could.

Q. Do you recall anything further about that conversation? A. Not particularly.

Q. I want you to look at Plaintiff's Exhibit 1-D-1 again, Mr. Lehman, particularly the second paragraph, and ask you whether reading that refreshes your recollection as to anything further stated by Mr. Greenberg. A. Oh, yes.

Q. All right. If it does refresh your recollection, will you state what it is.

A. He informed me that as far as he was concerned, we could play Lullaby Of Broadway on a 7 day availability, but that the La Tijera Theatre refused to permit it.

I couldn't go along with that line of thinking. It was his picture, he is the branch manager, and if it was satisfactory to him, I don't see how anybody else could tell him [2032] what to do with his picture.

That was the extent of that part of the conversation.

(Testimony of Sydney Lehman.)

Q. Subsequently, Mr. Lehman, did you have any further conversation with Mr. Greenberg about this matter of bidding and this matter of the La Tijera Theatre other than what Mr. Greenberg had previously discussed with you?

A. We were continually discussing the situation, because I was——

Mr. Mitchell: Your Honor, if we are going to have another discussion, let's fix the date and who was there.

Mr. Corinblit: All right. I'm sorry.

Q. Did you have a conversation on May 14th with Mr. Greenberg?

A. Yes, I believe we did.

Q. Do you remember what was said?

A. Well, I would rather be refreshed if there is a memorandum on it.

Q. I will show you Plaintiff's Exhibit 11-H for identification and ask you whether this is a memorandum which you prepared on or about May 14th of 1951.

Mr. Johnston: What was the number of that one, Mr. Corinblit?

Mr. Corinblit: 11-H.

The Witness: Yes. [2033]

Mr. Corinblit: What was the date of the conversation?

The Witness: May 14, 1951.

Q. (By Mr. Corinblit): Was it in person or over the telephone?

(Testimony of Sydney Lehman.)

A. It was over the phone.

Q. Will you tell us what you said and what Mr. Greenberg said?

A. Well, we were discussing runs and pictures, and he informed me that the La Tijera Theatre insisted upon clearance over the Paradise Theatre on both 7 day availabilities and 14 day availabilities, and he claimed his hands were tied and there was nothing he could do about it.

I then said to him, well, what happens if the La Tijera loses a bid to the Academy Theatre or the Fox Theatre or the Fifth Avenue Theatre? In that event could we play the pictures that the La Tijera lost day and date at the Paradise with either one of those theatres?

Well, he talked in circles, because——

Mr. Mitchell: I move to strike his statement that “he talked in circles.”

The Court: It may go out.

Mr. Corinblit: All right.

Q. What did Mr. Greenberg say in response to your statement? [2034] A. Nothing.

Mr. Mitchell: Then he didn't talk in circles.

The Witness: He talked in circles—well, all right.

Q. (By Mr. Corinblit): Now, finally, Mr. Lehman, did you have a conversation with Mr. Greenberg in about June 1951 about the picture *The Folsom Prison*?

A. Yes, I believe I did. [2035]

(Testimony of Sydney Lehman.)

Q. What did you say and what did he say, if you recall?

A. I believe there is a memorandum on that.

Q. I will show you Plaintiff's Exhibit 11-I for identification and ask you whether this memorandum of your conversation was prepared on or about the time it took place.

A. Yes, it was. Yes.

Q. All right. Now, does the document Exhibit 11-I for identification refresh your recollection as to your conversation with Mr. Greenberg on or about June 27, 1951?

A. Yes.

Q. And was that face to face or by telephone?

A. By telephone.

Q. And what did you say to him and what did he say to you?

A. Well, I asked Fred Greenberg why the picture Folsom Prison opened on June 27th at the La Tijera and there are two more theatres there—La Tijera, the United Artists and the Southside Theatres, whereas pictures like *Along The Great Divide* played the La Tijera Theatre only.

Greenberg informed me that the La Tijera will not permit us to play pictures day and date with them, but that they would permit the United Artists and/or the Southside Theatres to play day and date with them. We were excluded.

At that time I said that there must be collusion between the United Artists Theatre and the La Tijera Theatre in some [2036] form or other to

(Testimony of Sydney Lehman.)

permit the playing of pictures in that manner, and I told this to Fred Greenberg.

He called me back five minutes later and informed me that if we wanted to bid on a 14-day availability we should write them a letter to that effect.

I informed him that we didn't want to bid but we wanted the same courtesy that he gives to the La Tijera and United Artists Theatres, permitting them to negotiate on the seven-day and not bidding.

He in turn informed me that the minute he gives us a picture on the seven-day availability the La Tijera insists on bidding and that the La Tijera will not permit us to play any pictures day and date with them, and the moment this possibility arises they insist on bidding.

Q. All right. Now, to get clear the distances involved again, Mr. Lehman, the distance from the La Tijera Theatre to the United Artists Theatre is what distance?

A. May I refer to a piece of paper I have in my pocket.

Mr. Westbrook: That has been stipulated to at least ten times, I think.

Mr. Corinblit: I don't have it in front of me.

Mr. Mitchell: This just gets confusion into the record, everybody's estimate of the distances. If we have a stipulation let us take the stipulated figure.

Mr. Corinblit: All right. I have it here. It is 1.5 miles.

(Testimony of Sydney Lehman.)

Mr. Westbrook: That is correct.

Q. (By Mr. Corinblit): 1.5 miles. I don't find in the stipulation, but I think we have stipulated the distance between the Paradise and the La Tijera—

Mr. Westbrook: I believe that has been stipulated to be, two or three times, 2.1 miles.

Mr. Corinblit: Very well, 2.1 miles.

Q. (By Mr. Corinblit): Now, Mr. Lehman, calling your attention to the defendant Universal. When you took over the job of buying and booking for the Paradise Theatre, did you have any discussion with the representatives of the Universal Company in order to get pictures for the Paradise Theatre?

A. Yes, I did.

Q. And who did you talk to?

A. I talked to Bill Marriott, the branch manager, about the pictures.

Q. And when did you have your first conversation with him, if you remember?

A. Well, you see, when we took over the buying and booking for the Paradise Theatre it was I believe on December 20th.

Now, that was during the Christmas holidays and it is [2038] possible that the branch manager was away on his vacation, because most film people take their vacations during the Christmas and New Year's season. Therefore, I say I may have talked to him the last week in December, but then again it may not have been until the first week in January.

(Testimony of Sydney Lehman.)

Q. Was this on the telephone or face to face?

A. On the phone.

Q. What did you say to him and what did he say to you?

A. Well, I asked Bill for first-run pictures at the Paradise Theatre. He told me it was impossible to give me first-run pictures. We argued a little while about it. He told me that they had a five-theatre setup in which they were playing their pictures. And then I asked him for seven-day availabilities and he informed me that I would have to bid for the seven-day availability.

I informed him that as far as we were concerned we had no opposition, no competition, and therefore we would not bid for the seven day which he insisted upon.

Q. Now, subsequently—there is in evidence a letter to Mr. Marriott dated March 26, 1951, which is Exhibit 15-M in evidence, and which we have already read to the jury, in which you asked for negotiations on the picture *Bedtime For Bonzo*, on a seven-day availability. A. Yes.

Q. Now, on or about April 2, 1951, Mr. Lehman, did you [2039] have a conversation with Mr. Marriott about the matter of first run and seven-day pictures? A. Yes, sir, I believe I did.

Q. Do you have a recollection of that conversation?

A. Was that with reference to a picture called *Up Front*?

(Testimony of Sydney Lehman.)

Q. No, that comes later.

A. No, I would have to be refreshed.

Q. I will show you Exhibit 15-M, which is a memorandum, and I will ask you whether or not you caused this memorandum to be prepared on or about the time that it is dated. A. Yes.

Q. All right. Now, does that refresh your recollection as to a meeting that you had with, or a conversation you had with Mr. Marriott on or about April 2nd? A. Yes.

Q. Will you state what the conversation was, what you said and what he said?

A. Well, I talked to Bill Marriott at that time about pictures, and he informed me that his district manager, Mr. Barney Rose and the western division sales manager Mr. Blake were both in Los Angeles, and that he had discussed the Paradise situation at a meeting with both these gentlemen, and that they refused to permit us to play seven-day pictures unless we bid for the same. [2040]

I asked him at the time that in the event any of the bids were rejected would he permit us to negotiate for any of the pictures on which the bids were rejected, and he said he would.

Mr. Corinblit: To save time, your Honor, we would like to offer in evidence Plaintiff's Exhibit 15-O, a letter of Lehman to Marriott dated April 2nd.

Exhibit 15-P, a letter from Lehman to Marriott dated April 22nd.

(Testimony of Sydney Lehman.)

15-Q-1, a letter from Lehman to Marriott dated April 19th, and 15-R, a letter from Lehman to Marriott dated April 25th.

(Hanging documents to Mr. Mitchell.)

Mr. Corinblit: 15-R is already in evidence. [2041]

Mr. Corinblit: Offered in evidence, your Honor.

The Court: It may be received in evidence.

The Clerk: 15-O, 15-P and 15-Q-1.

(The exhibits referred to were received in evidence and marked as Plaintiff's Exhibits 15-O, 15-P and 15-Q-1.) [2042]

* * * * *

Q. (By Mr. Corinblit): That last letter is dated April 19, 1951. Do you remember having a conversation with Mr. Marriott about the picture Up Front on May 2, 1951? A. Yes, I do.

Q. Was it face to face or over the telephone?

A. Over the phone.

Q. Do you remember what you said first to Mr. Marriott and what he said to you?

A. I believe I wrote a memorandum on that.

Q. I will show you Plaintiff's Exhibit 15-S for identification and ask you whether or not you caused this memorandum of the conversation to be prepared as of May 2, 1951? A. Yes, I——

Q. Just a minute. Mr. Lehman, will you first tell us what you now recall, with this document refreshing your recollection, as to the conversation with Mr. Marriott.

(Testimony of Sydney Lehman.)

A. I talked to Bill Marriott about the picture Up Front.

He told me that the picture was going to play at the Academy Theatre in Inglewood on the 7 day availability.

I asked him if I could play the picture day and date with the Academy. [2044]

He informed me that if I could obtain permission of Fox West Coast, it would be satisfactory to him. I called——

Q. Just a minute. After that conversation with Mr. Marriott, did you call someone at Fox West Coast? A. Yes, I did.

Q. When did you make the call?

A. Almost immediately.

Q. Who did you talk to?

A. Well, I tried to talk to Mr. Bert Pirosh, who was the buyer, head buyer and booker at the time, but he was in Washington and I reached his assistant, Mr. Frank Prince.

Q. What did you say to Mr. Prince and what did Mr. Prince say to you?

A. I told Frank that Bill Marriott was agreeable to our playing the picture day and date with the Academy and I requested his permission to permit us to play the picture day and date.

Frank said he would discuss it and call me back.

Q. Subsequent to that conversation with Mr. Prince, did he call you back?

A. Yes, he did.

(Testimony of Sydney Lehman.)

Q. When was that?

A. I believe it was the same afternoon.

Q. What did he say to you and what did you say to him?

A. He said we couldn't have the picture. [2045]

Mr. Corinblit: We will offer in evidence Plaintiff's Exhibit 15-T for identification.

The Court: In evidence.

The Clerk: Exhibit 15-T.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit 15-T.)

Mr. Corinblit: This is a letter from Lehman to Marriott dated May 4, 1951.

"Dear Bill:

"I would like to negotiate with you at your earliest convenience to play your production *Ma And Pa Kettle Back On The Farm* at the Paradise Theatre to play seven days after Los Angeles first run closing.

"May I suggest that you contact me at your earliest convenience in regard to this matter."

Q. Do you remember, did Mr. Marriott contact you on that picture?

A. No, I don't believe he did.

Mr. Mitchell: Don't you agree he offered him an opportunity to bid on that picture and all the others?

Mr. Corinblit: Well, Mr. Mitchell, if you want to make an argument, we can save that.

Q. Now, with respect to the distributors Loew's,

(Testimony of Sydney Lehman.)

I think we can hurry this along now, Mr. Lehman, did you have a [2046] discussion with someone at Loew's in order to get pictures for the Paradise Theatre when you took over the buying and booking?

A. Yes, I did.

Q. With whom did you have a conversation?

A. Mr. Tom Aspell, the branch manager.

Q. Where was it? Over the telephone or face to face?

A. I don't exactly recall where it was.

Q. All right. About when did it take place?

A. The last week in December or the first week in January.

Q. What did you say to Mr. Aspell and what did he say to you?

A. Well, at that time I told him that we wanted to play their pictures first run day and date with the other theatres that were playing their pictures first run.

He told me that he wouldn't permit us to play his pictures first run in Westchester.

Then I asked him for 7 day pictures.

He informed me that we could bid for the pictures.

I in turn informed him we didn't think we were in substantial competition with any of the theatres in Inglewood, and that is where the matter rested.

Mr. Corinblit: Referring to Exhibits 7-H, Lehman to Aspell, dated March 26, 1951, and 7-I, Aspell to Lehman—well, no, I will start all over again.

7-H, Lehman to Aspell, dated March 26, 1951;

(Testimony of Sydney Lehman.)

7-I, Aspell to Lehman, dated March 27, 1951; 7-J, Lehman to Aspell, April 2, 1951; 7-K, Aspell to Lehman, dated April 4, 1951; 7-L, which is Aspell to Lehman, dated April 9, 1951; 7-M, which is Lehman to Aspell, dated April 19, 1951; 7-N, Lehman to Aspell, dated May 4, 1951, 7-O, Aspell to Lehman, dated May 8, 1951; and 7-P, Aspell to Lehman, dated May 18, 1951, I would like to offer these exhibits in evidence. [2048]

Mr. Mitchell: The letter of March 26 is already in evidence as Defendant Loew's G-5.

Mr. Corinblit: We will offer this as part of the plaintiff's case.

Mr. Mitchell: Do we need to have a letter in twice, your Honor?

The Court: Well, I don't know if it is necessary or not. If he wants it in, I see no objection to it.

I don't think it makes very much difference whether the evidence comes in as the defendant's or the plaintiff's. Counsel sometimes seem to think there is an advantage.

Mr. Mitchell: I don't see any difference either.

Mr. Corinblit: I might say, your Honor, that tomorrow morning in advance of the session, I will submit to counsel for plaintiffs—to counsel for the defendants these exhibits and we can go over them which will save some time.

The Court: Very well.

Mr. Mitchell: No objection.

The Court: They may be received in evidence.

(Testimony of Sydney Lehman.)

The Clerk: Plaintiff's Exhibits 7-H, 7-I, 7-J, 7-K, 7-L, 7-M, 7-N, 7-O and 7-P in evidence.

(The documents referred to were marked Plaintiff's Exhibits 7-H, 7-I, 7-J, 7-K, 7-L, 7-M, 7-N, 7-O, and 7-P, and received in evidence.) [2049]

* * * * *

Q. (By Mr. Corinblit): Mr. Lehman, when you took over the buying and booking for the Paradise Theatre in December 1950, did you discuss obtaining pictures for the Paradise with any representative of Paramount Pictures? A. Yes, I did.

Q. Who did you talk to?

A. Mr. Al Taylor, the branch manager.

Q. Was that face to face or on the telephone?

A. I don't recall exactly, but I believe it was on the phone.

Q. Approximately when did the conversation take place?

A. Either the last week in December or the first week in January.

Q. Will you tell us what you said to Mr. Taylor and what Mr. Taylor said to you?

A. Well, I told Al that we were buying and booking pictures for the Paradise Theatre and that we wanted first run in the Westchester area, to play day and date with the Paramount Theatre Downtown and on Hollywood Boulevard.

He informed me that they had a franchise agreement and it was impossible for him to give me first run.

(Testimony of Sydney Lehman.)

Then I asked him for 7 day availability.

He informed me that I was permitted to bid on the 7 day availability.

I then informed him that we weren't in competition with any of the theatres that he mentioned, and the conversation ended there.

Q. Subsequently did Paramount offer to negotiate, as distinguished from competitive bidding, with the Paradise Theatre? [2059]

A. Well, I know he offered to negotiate with me on either one or two pictures, but not on all the pictures.

Q. Other than those one or two? A. No.

Mr. Corinblit: We will offer in evidence Plaintiff's Exhibit 3-B, which is a letter from Lehman to Taylor dated March 26, 1951. Attached to that inadvertently is a memorandum not properly admissible as a communication and I will detach that. They have somehow become stapled together.

Mr. Mitchell: I am sure they are not part of the same document and never were.

Mr. Corinblit: That is correct. I will detach it.

The Court: It may be admitted in evidence.

The Clerk: Plaintiff's Exhibit 3-B.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit 3-B.) [2060]

The Court: Mr. Johnston, might I ask you a question? [2061]

Mr. Johnston: Certainly, your Honor.

(Testimony of Sydney Lehman.)

The Court: You notice that letter says there is no 7 day theatre in direct competition. Do you admit that the Loyola was a first run theatre and not a 7 day theatre?

Mr. Johnston: It played Fox pictures on first run.

The Court: And it played Fox pictures most of the time?

Mr. Johnston: All of the time——

The Court: Practically all of the time?

Mr. Johnston: All of the time during the period we are concerned with from August, 1950 to September, 1951, it played nothing by Fox pictures on the top half of the double bill.

The Court: Then you don't question the statement that as far as the Loyola Theatre is concerned, the Paradise Theatre was not in competition on 7 days with Loyola?

Mr. Johnston: It was perhaps not in competition on 7 days, because the Loyola was not playing 7 day availability.

The Court: Then as far as——

Mr. Johnston: I question the rest of the statement. They were in competition with the Academy and the other theatres in Inglewood.

The Court: That is your contention?

Mr. Johnston: That's right.

The Court: The plaintiff's contention is to the [2062] contrary.

Mr. Johnston: Yes.

The Court: But you do not find any fault with

(Testimony of Sydney Lehman.)

that statement as far as the Loyola Theatre is concerned?

Mr. Johnston: I find no fault with the statement on 7 day availability the Loyola and the Paradise were not in competition.

The Court: All right.

Mr. Johnston: Because they weren't playing on the same availability. [2063]

Q. Mr. Lehman, did you subsequently have a conversation with Mr. Taylor about the picture—well, about your letter of March 26th, and about the picture Molly? A. Yes, I believe I did.

Q. Do you remember when the conversation took place?

A. Not exactly, no. I would have to be refreshed.

Q. All right. We will mark as Plaintiff's next in order, which I inadvertently failed to have marked before this, a memorandum dated March 27, 1951.

The Court: Might I ask this witness a question?

Mr. Corinblit: Yes.

The Court: Was it your custom to make a memorandum of conversations that you had with these various distributors?

The Witness: Well, your Honor, Mr. Alex Schreiber was out of town for a considerable amount of time and I didn't want to forget what went on in order to brief him when he returned to town, so it was my practice to make these memoranda when he wasn't here.

The Court: Did you make the memorandum

(Testimony of Sydney Lehman.)

shortly after the conversation or immediately after?

The Witness: Almost immediately.

The Court: Almost immediately after.

The Witness: Yes, sir.

The Court: And you put down in the memoranda what you said and what the other party said?

The Witness: Yes, sir.

The Clerk: Is this for identification?

Mr. Corinblit: Yes.

The Clerk: 65 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 65 for identification.)

Q. (By Mr. Corinblit): Mr. Lehman, I will show you Plaintiff's Exhibit 65 for identification and ask you if, after reading this memorandum—I will first ask you whether or not you prepared this memorandum shortly after the conversation with Mr. Taylor. A. Yes.

Q. All right. And I will ask you to read it and tell me if this refreshes your recollection as to what was said by you and what was said by Mr. Taylor at that time. A. Yes.

Q. I will ask you to state to the jury what you recall about that conversation.

A. Well, Mr. Taylor called me on March 27th with reference to the letter that Mr. Corinblit just read, dated March 26th, and he informed me that the picture that I requested to negotiate for had already been sold.

I asked him if any pictures were not bid for would he give me an opportunity to negotiate for

(Testimony of Sidney Lehman.)

them, and he said he would. But I noticed at that time that there was a picture [2065] by the name of Molly which had not played in any of the theatres in that particular area on the seven-day availability or the 14-day availability, but Taylor had not called me and offered the picture to me.

Mr. Corinblit: I offer in evidence Plaintiff's Exhibit 3-D-1, which is Mr. Lehman's letter to Mr. Taylor.

The Clerk: 3-D-1.

The Court: In evidence.

(The document referred to was received in evidence and marked as Plaintiff's Exhibit No. 3-D-1.) [2066]

* * * * *

Q. (By Mr. Corinblit): Now, Mr. Lehman, subsequently did you have a conversation with Mr. Carmichael of Paramount with regard to the pictures September Affair and The Redhead And The Cowboy on the 14-day availability?

A. Yes, I believe I did.

Q. Do you remember when that conversation took place?

A. I don't know. I would imagine it was sometime in April of 1951.

Q. And was it face to face or on the telephone?

A. No. I believe it was on the phone.

Q. And what did he say to you and what did you say to him?

A. It is pretty hard to recall. Didn't I make a memorandum on that?

(Testimony of Sidney Lehman.)

Q. Yes, you did. I will show you Plaintiff's Exhibit 3-D-2 for identification and ask you whether you caused this memorandum to be prepared shortly after the conversation. A. Yes, I did.

Q. All right. I will ask you to look at it and then tell me if it refreshes your recollection as to what you said to Mr. Carmichael and what Mr. Carmichael said to you. A. Yes.

Q. Will you state what you recall of the conversation? [2067]

A. Well, I wanted to buy September Affair and The Redhead And The Cowboy on a 14-day availability and Ralph Carmichael, the sales manager for Paramount, informed me that these pictures had been sold to the Academy and the Imperial Theatres with clearance over the Paradise Theatre and therefore I couldn't play the pictures on that availability.

Mr. Mitchell: Will you speak up a little, Mr. Lehman?

The Witness: Yes, surely.

Mr. Mitchell: It is impossible for me to hear you.

Will you read the last portion of the answer, Mr. Reporter?

(Answer read.)

Q. (By Mr. Corinblit): You mentioned the Academy. I want to show you your memorandum Exhibit 3-D-2, and ask you if that refreshes your recollection.

A. I am sorry. It was the Fox and Imperial and not the Academy.

(Testimony of Sidney Lehman.)

Q. Now, the Imperial Theatre—here is the Paradise and the Imperial is located here and the Fox Theatre is here in downtown Inglewood.

When you took over buying and booking for the Paradise Theatre did you discuss buying pictures for the Paradise with anyone at Twentieth Century-Fox? A. Yes, I did. [2068]

Q. Who did you talk to?

A. I talked to Clyde Eckhardt, the branch manager.

Q. When did that take place?

A. Either the last week in December or the first week in January.

Q. Was that face to face or over the telephone?

A. I don't recall which it was.

Q. All right. What did you say to him and what did he say to you?

A. Well, I informed Clyde that we would like to play their pictures first run in that area.

He informed me that they played at the Loyola Theatre and that it was impossible for them to give them to me.

I then asked him if I could play his pictures 7 days in that area.

He said no, that they were obligated to play at the Fox theatres in Inglewood, and that is where the conversation ended.

Mr. Corinblit: We will offer in evidence at this time Plaintiff's Exhibit 18-E (handing document to counsel).

I offer it in evidence, your Honor.

(Testimony of Sidney Lehman.)

The Court: In evidence.

The Clerk: Exhibit 18-E.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit 18-E.)

Mr. Corinblit: I don't think I will read the letter again. It is a copy of the same letter that was sent to the other distributors re the picture *Born Yesterday*, and here the request is made to negotiate for the picture *Rawhide* on the 7 day availability.

I offer in evidence Plaintiff's Exhibit 18-F, which is a request re *Sword of Monte Cristo* and *Lucky Kane*.

In evidence already is 18-G, which is Mr. Eckhardt's reply.

Mr. Johnston: This is in evidence, you say?

Mr. Corinblit: Yes, 18-G is already in evidence, in which reference is made to the policy of Twentieth Century-Fox. I won't read that at this time.

Q. (By Mr. Corinblit): Mr. Lehman, when you took over the buying and booking for the Paradise Theatre, did you have any discussions with any representative of RKO? A. Yes, I did.

Q. Who did you talk to?

A. Mr. Harry Cohen, the branch manager.

Q. Did that take place about the same time?

A. Just about, yes.

Q. As a matter of fact, when you took over the buying and booking, naturally, as part of your job, it was your job to contact everybody?

A. Immediately. [2070]

(Testimony of Sidney Lehman.)

Q. Immediately, to talk to them about getting pictures for the Paradise Theatre? A. Yes.

Q. That is the business you were in?

A. Yes.

Q. When you talked to Mr. Cohen, was that face to face or on the telephone?

A. That is hard to recall. It was either one.

Q. What did you say to Mr. Cohen and what did he say to you?

Mr. Mitchell: I assume, your Honor, we have the same running objection to these conversations that don't have anything to do with the defendants in this case?

The Court: Yes, you can have a running objection. Same objection and same ruling.

Q. (By Mr. Corinblit): You may answer, Mr. Lehman.

A. I talked to Harry and asked Harry for first run pictures in that area.

He informed me that their pictures at that time were playing first run at the RKO Hillstreet and the RKO Pantages Theatres in downtown and Hollywood, and that he couldn't give me first run pictures.

I then asked him for 7 day availability pictures.

He informed me that I would have to bid for the pictures. [2071]

I told him that we were not in competition with any of the theatres in that area and, therefore, we were not bidding for the pictures, and that is where that conversation ended.

(Testimony of Sidney Lehman.)

Mr. Corinblit: We will offer in evidence Plaintiff's Exhibit 22-R, which is a letter from Lehman to Cohen dated March 26, 1951.

The Court: In evidence.

The Clerk: Exhibit 22-R.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit 22-R.)

Mr. Corinblit: I don't think I need read this letter. It is the same letter which referred to Born Yesterday and asked to negotiate at this time with reference to the picture Vendetta.

Q. (By Mr. Corinblit): You subsequently played the picture Vendetta, did you not, Mr. Lehman? A. Yes, we did.

Mr. Johnston: On a 7 day availability.

Mr. Corinblit: That is correct.

Q. After you played that one picture from RKO, you sent another letter? A. Yes.

Mr. Corinblit: We will offer in evidence Plaintiff's Exhibit 22-X, which is a letter from Lehman to Cohen dated [2072] April 2, 1951.

The Court: In evidence.

The Clerk: Exhibit 22-X.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit 22-X.)

* * * * *

Mr. Corinblit: We will now offer in evidence the following exhibits:

23-A, which is a letter from Lehman to Cohen, April 19, 1951, attached to which is Mr. Cohen's

(Testimony of Sidney Lehman.)

reply dated April 20, 1951, and a letter May 7, 1951, Lehman to Cohen.

Mr. Johnston: What is the number?

Mr. Corinblit: 23-C and 23-D, the reply, Cohen to Lehman, dated May, 1951. I will offer them in evidence, your Honor.

The Court: In evidence.

The Clerk: 23-A, 23-C and 23-D.

(The exhibits referred to were received in evidence and marked as Plaintiff's Exhibits 23-A, 23-C and 23-D.) [2074]

* * * * *

Q. (By Mr. Corinblit): With respect to the seven-day availability that Mr. Cohen—did Mr. Cohen offer to negotiate for the picture *The Thing*?

A. No.

Q. Now, shortly after this or, rather, early in May did you have a conversation with Mr. Cohen about *The Thing* with respect to the Paradise Theatre on a 14-day availability at the Paradise Theatre?
A. I believe I did.

Q. Do you remember about when that conversation took place?

A. I believe it was sometime in May, but just when I don't recall.

Q. Do you recall whether it was face to face or on the telephone?

A. I believe it was on the telephone.

Q. Do you remember what he said and what you said?

(Testimony of Sidney Lehman.)

A. No, I don't offhand unless I have a memo on it.

Q. Yes, you do. I will show you Exhibit 23-F and ask you whether or not you caused this memorandum to be prepared shortly after the conversation took place. A. Yes, sir, I did.

Q. I will ask you to read it and then state if that refreshes your recollection as to the conversation.

A. Yes. [2076]

Q. All right. Will you state what you recall about the conversation between you and Mr. Cohen?

A. Well, I talked to him and asked him about playing *The Thing From Another World* on 14-day availability. He advised me that he would call me back.

He called me an hour and a half later and he informed me that the picture was sold to the Academy Theatre and that Frank Prince refused him permission to permit us to play the picture day and date with the Academy Theatre.

Q. All right. Now, who was Mr. Prince at that time?

A. Frank Prince at that time was the assistant to Bert Pirosh, the head buyer and booker of Fox West Coast Theatres.

Q. Now, sometime in June did you have a conversation with Mr. Cohen about the picture *Sealed Cargo*? A. Yes, I did.

Q. Was that face to face or on the telephone?

A. I am not certain, but I believe it was on the phone.

(Testimony of Sidney Lehman.)

Q. And what did you say and what did he say to you?

A. Well, I wanted to play Sealed Cargo on the seven-day availability at the Paradise Theatre.

Don't I have a memo on that, Mr. Corinblit?

Q. Yes, you do. I will show you Exhibit 23-J-1 and ask you whether you caused this memorandum to be prepared shortly after the conversation with Mr. Cohen. [2077]

A. Yes, I did.

Q. I will ask you to examine it and state whether that refreshes your recollection as to the conversation.

A. Yes.

Q. All right. I will ask you to state what you recall of the conversation.

A. Mr. Harry Cohen advised me that the United Artists Theatre had won the bid on Sealed Cargo and I had the information that the picture was playing not only at the United Artists Theatre on a seven-day availability, but also at the La Tijera Theatre, and I asked him how it was possible that two theatres could play Sealed Cargo on the seven-day availability.

He informed me that the United Artists Theatre had won the bid and released clearance over the La Tijera Theatre.

Q. All right. Now, Mr. Lehman, let me stop you right there.

The La Tijera Theatre is located here and the United Artists Theatre is located here and it has been stipulated in this case that the distance between the two theatres is 1.5 miles.

(Testimony of Sidney Lehman.)

When you took over the buying and booking for the Paradise Theatre, Mr. Lehman, did you talk to anyone at Columbia? A. Yes, I did.

Q. And was that again in December or early January? A. Yes, sir.

Q. And who did you talk to at Columbia?

A. Mr. Wayne Ball, branch manager.

Q. Who was Wayne Ball?

A. He was the branch manager.

Q. All right. And was that face to face or on the telephone?

A. I don't recall exactly, but I believe it was on the phone.

Q. And what did you say to him and what did he say to you?

A. Well, at that time I informed Wayne that we wanted to play his pictures first run day and date with other theatres that were playing his pictures, and he said he would not permit us to do it.

I asked him if we could play his pictures on a seven-day availability, and he informed me that we could not play his pictures on the seven-day availability and that is where the conversation ended.

Q. Do you recall, Mr. Lehman, subsequently the picture *Born Yesterday* that the Paradise played in March of 1951, was a Columbia picture?

A. Yes, it was.

Q. That is the picture that you played day and date [2079] with the *La Tijera*?

A. Yes, sir.

Q. The Paradise, the Southside and Imperial.

(Testimony of Sidney Lehman.)

A. Yes.

Q. Now, do you remember that subsequently the Paradise played a picture from Columbia called Santa Fe? A. Yes, I do.

Q. Now, did you have a conversation with Mr. Mel Evidon of Columbia with respect to the picture Santa Fe? A. Yes, I did.

Q. Do you remember when that conversation took place?

A. I believe it was sometime in May of 1951.

Q. All right. And was that face to face or on the phone? A. Yes.

Q. That was in your office? A. Yes.

Q. Will you tell me what Mr. Evidon said to you and what you said to him?

A. We had the picture Santa Fe bought on the seven-day availability. The seven-day availability was on a Wednesday. I don't remember the exact date, but due to the fact that the Paradise Theatre had been rented to some organization for a meeting we couldn't open this picture until Friday.

We opened a Metro picture, a companion picture with [2080] Santa Fe called Father's Little Dividend, and I believe we opened that on Thursday because we could take off the second feature and replace it with Father's Little Dividend. The first feature we couldn't take off because it was a percentage picture. I believe the name of the picture was Valentino.

We had Santa Fe scheduled to open on Friday with Father's Little Dividend and Mel Evidon, the

(Testimony of Sidney Lehman.)

sales manager at Columbia, came up to the office and he said there was an awful lot of trouble because of the fact that Fox had Santa Fe, had been playing Santa Fe since Wednesday. I forget the name of the picture they had with it, but it wasn't a very big picture. And that we were playing Santa Fe with Father's Little Dividend and therefore Fox pulled the picture after two days when they had it scheduled for seven and refused to play it.

Q. Now, did Mr. Evidon state to you—did he state to you what was the reason that Fox had stated they were going to pull the picture?

A. Well, if I remember correctly—I know I have it in a memorandum, but if I remember correctly the reason was that we had them out-booked.

The Court: What do you mean by "out-booked?"

The Witness: Well, your Honor, we had a better second feature than they did and therefore our program was more attractive in their estimation.

Q. (By Mr. Corinblit): That was with reference to the [2081] second picture? A. Yes, sir.

Q. Now, with reference to the first feature did he give you the reason for the pulling of the picture Santa Fe? A. (No response.)

Q. If you recall.

A. I know there was some conversation about it and I think I have it in a memorandum, but I just can't recall.

Q. I will show you a memorandum—your memorandum exhibit marked 27-G and call your attention to the second paragraph thereof.

(Testimony of Sidney Lehman.)

First, I will ask you if you caused this to be prepared shortly after your conversation with Mr. Evidon.

A. Yes, I did.

Q. I will ask you to read particularly the last portion of the second paragraph and ask you if that refreshes your recollection on that score.

A. Yes, it does.

Q. Now, calling your attention particularly to the second paragraph of the memorandum and the last portion of it, I will ask you to state whether or not that refreshes your recollection, and you can answer that yes or no, Mr. Lehman. If it does, all right, and if it doesn't that ends it.

A. Well, the—— [2082]

Mr. Mitchell: I can't hear you.

The Court: Answer the question yes or no.

Q. (By Mr. Corinblit): Does it refresh your recollection? A. Not particularly. [2083]

Mr. Mitchell: May I see that, please?

Mr. Corinblit: Yes, certainly.

Q. (By Mr. Corinblit): When you began buying and booking for the Paradise Theatre, did you talk to anyone at United Artists?

A. Yes, I did.

Q. Who did you talk to at United Artists?

A. Bert Pollard, who was at that time branch manager.

Q. Was that face to face or on the telephone?

A. I don't remember.

(Testimony of Sidney Lehman.)

Q. What did you say to him and what did he say to you?

A. I informed Bert we wanted their pictures first run to play day and date with the other first run theatres in town.

He refused to give them to me.

I then asked him for his pictures 7 days.

He refused to give them to me and that is where that conversation ended.

Mr. Corinblit: We will offer in evidence Plaintiff's Exhibit 30-I, which is a letter from Lehman to Pollard dated March 26, 1951; a letter, 30-J, from Lehman to Pollard, dated April 19, 1951; a letter from Pollard to Lehman dated April 25, 1951, which is 30-L; and a letter from Lehman to Carnegie, dated April 30, 1951, which is 30-M.

The Court: In evidence, [2084]

The Clerk: 30-I, 30-J, 30-L and 30-M.

(The exhibits referred to were received in evidence and marked Plaintiff's Exhibits 30-I, 30-J, 30-L and 30-M.) [2085]

* * * * *

Q. (By Mr. Corinblit): Subsequent to this letter of April 30, 1951, did United Artists offer to negotiate with the Paradise Theatre for 7 day pictures? A. Yes.

Q. When did that take place?

A. I may be wrong, but I believe it was some time around August, around there, 1951.

Q. Between the date of your letter, which is April 30th, and that date in August, did United

(Testimony of Sidney Lehman.)

Artists offer to negotiate for 7 day pictures?

A. No.

Q. Mr. Lehman, with respect to the theatres in the Inglewood-Westchester area—— [2087]

The Court: May I ask a question before you go on? I want to ask this witness a question.

Mr. Corinblit: Yes, sir.

The Court: There seems to be quite a difference between negotiating for pictures and bidding for pictures.

The Witness: Yes, sir.

The Court: From the standpoint of the exhibitor, what advantage does the exhibitor have in negotiating over bidding, or what advantage is there to bidding?

The Witness: There are so many pictures available, your Honor, each week as they come off first run.

The Court: Speak up loud. You are speaking to the jury. I want the jury to hear this.

The Witness: I'm sorry. There are so many pictures available each week as the pictures move out of first run and go into the 7 day availability. For instance, if five pictures are available, and if you are in a position to negotiate, you could negotiate for two of those pictures that you believe could play to the best gross of the theatre. But in the event you had to bid for those pictures, you couldn't bid for five pictures, because if you won the bid on all the pictures, you couldn't possibly play them.

(Testimony of Sidney Lehman.)

Therefore, you pick two pictures and you bid for them. One you may get and one you may lose. Meantime you may lose the other three you didn't bid on and then you are [2088] without a picture. It is a very unsatisfactory situation.

The Court: From the standpoint of the exhibitor?

The Witness: From the standpoint of the exhibitor, yes, sir.

The Court: But from the standpoint of the distributor, the distributor is interested in getting his pictures out at the most advantageous terms, isn't he?

The Witness: Well, your Honor——

Mr. Corinblit: Just a minute. Your Honor, I object to that question.

The Court: All right. You object. All right. I will withdraw the question. I will let the other side go into that, if they want to, when they have the exhibitors here.

Mr. Corinblit: The distributors, you mean?

The Court: Yes. But it is your opinion that as far as the exhibitor is concerned, it is much better for the exhibitor to negotiate?

The Witness: Yes, sir.

The Court: Than it is to bid?

The Witness: Yes, sir.

Q. (By Mr. Corinblit): Mr. Lehman, turning to this Inglewood-Westchester area, did you have an opinion in 1950-1951 as to whether the Paradise Theatre was in substantial competition with any

(Testimony of Sydney Lehman.)

of the theatres in Inglewood or the La [2089] Tijera—that is, did you have an opinion as to whether they were in substantial competition with the Southside Theatre? Did you have such an opinion? A. Yes, I did.

Q. What was your opinion?

A. That they were not in competition with the Southside Theatre.

Q. Did you have an opinion as to whether the Paradise was in substantial competition with the Academy or the Southside Theatre?

A. Yes, I did.

Q. What was your opinion?

A. That they were not in competition with either of those theatres.

Q. Did you have an opinion as to whether the Paradise was in substantial competition with the theatres in Inglewood downtown, including the Inglewood, UA, Ritz, and so forth? A. Yes, sir.

Q. What was your opinion?

A. That we were not in substantial competition with any of those theatres.

Q. How about your opinion with respect to the La Tijera?

A. That we were not in substantial competition with the La Tijera Theatre.

Q. Now, with respect to these theatres and your opinion [2090] on substantial competition, what was the basis upon which you had that opinion?

A. Well, all these theatres that you mentioned and the Paradise Theatre are located in separate

(Testimony of Sydney Lehman.)

areas. They have separate shopping centers and they are complete and distinct areas unto themselves, and I didn't feel that one area would take any business from another, or vice versa. I believe in a highly populated area, such as those theatres were located in, that there was no substantial competition.

Q. Did the matter of distance come into play at all?

A. Yes. Distance is a very important thing, and in highly populated areas, the area that you consider no competition narrows considerably.

Mr. Corinblit: I think that is all, your Honor. I have no further questions.

The Court: You didn't represent any of the theatres in the immediate neighborhood, did you, the immediate territory?

The Witness: No, sir.

The Court: How long did you say you had been booking and buying pictures?

The Witness: I associated myself with Exhibitors Service in December, 1946, but I had been buying and booking pictures prior to that in other territories.

The Court: In the buying and booking of pictures, [2091] you came into this question of what is meant by substantial competition?

The Witness: Oh, yes, sir.

The Court: It is a question that arises constantly in the trade, is it not?

The Witness: Yes, sir.

(Testimony of Sidney Lehman.)

The Court: All right.

Mr. Mitchell: Your Honor, rather than interrupt, I wonder if I could get my papers organized during the recess.

The Court: Yes, we can take our recess.

Ladies and gentlemen of the jury, we are about to take another recess.

Again it is my duty to admonish you you are not to discuss this case with anyone, you are not to allow anyone to discuss it with you, and you are not to formulate or express any opinion as to the rights of the parties until this case has been finally submitted to you.

With that admonition, we will now recess until five minutes after 11:00.

(Recess.) [2092]

The Court: Do you stipulate the jury are present and in the jury box?

Mr. Corinblit: So stipulated.

Mr. Mitchell: Yes.

The Court: You may proceed.

Cross Examination

Q. (By Mr. Mitchell): Mr. Lehman, I would like to establish when Mr. Schreiber was away from Los Angeles during a particular period of time and I think we can either do it by stipulation or by your refreshing your recollection. If you will look at page——

The Court: Counsel will stipulate with you on that, if he knows the facts.

(Testimony of Sidney Lehman.)

Mr. Mitchell: I want to establish that Mr. Schreiber was away from Los Angeles from December 25, 1950 to February 2, 1951.

The reference is at page 451, lines 24 to 25 of his deposition, and page 445, line 6 to 15.

The Court: You mean Mr. Schreiber's deposition?

Mr. Mitchell: Yes.

The Court: Counsel will stipulate to that.

Mr. Mitchell: He wants to check it and I am sure he will. It is page 451, lines 24 to 25. [2093]

Mr. Corinblit: Yes.

Mr. Mitchell: Which covers the period at the end of the year and then 445, line 6 to 16.

Mr. Corinblit: Yes. Now, your first request is what?

Mr. Mitchell: I am asking you to stipulate that Mr. Schreiber was absent from Los Angeles from December 25, 1950, to February 2, 1951.

Mr. Corinblit: Yes, I will stipulate to that. I can't quite put these figures together.

(Discussion between Mr. Westbrook and Mr.

Corinblit inaudible to the reporter.)

Mr. Corinblit: Yes, that is correct. We will stipulate to that.

Mr. Mitchell: I would also like to have you look, if you will, please, Mr. Corinblit, at page 418, line 9 to line 14, and stipulate with me that Mr. Schreiber was in Los Angeles from February 5, 1951, to April 23, 1951.

Mr. Corinblit: So stipulated.

(Testimony of Sidney Lehman.)

Q. (By Mr. Mitchell): Thank you. Now, Mr. Lehman, during the period that Mr. Schreiber was away from Los Angeles, from December 25, 1950, to February 2, 1951, you were doing the buying and booking for the Paradise, weren't you?

A. Yes, I was.

Q. And during that time you did not make any memoranda at all, did you? [2094]

A. Well, if they are not here, I didn't.

Q. You started making memoranda immediately after you wrote that Born Yesterday form letter that you sent to all the distributors on March 26, 1951, isn't that right? A. I believe so.

Q. And then you started making memoranda on March 26, 1951, right?

The Court: He said he believed so.

Mr. Mitchell: All right, your Honor.

Q. And that was during the period of time when Mr. Schreiber was here in Los Angeles.

I call your attention to that fact. Do you want to tell me that you were making these memoranda because Mr. Schreiber was away?

A. Well, no, but you see, it wasn't possible to get Mr. Schreiber on the phone at any particular moment. I don't know that he was in town or out of town.

I know Mr. Schreiber has made periodical trips to San Francisco and Palm Springs and things of that sort which I am sure was in that period.

But also I know that on many occasions I tried to get Mr. Schreiber on the phone and on complete

(Testimony of Sidney Lehman.)

days would pass and I was unable to reach him and therefore those memorandums were for his information and to refresh my memory when I discussed the same with him. [2095]

Q. Do you keep memoranda for your other accounts? A. Yes, I do.

Q. For each of them?

A. Well, no. We have many accounts that do not have the situation that the Paradise has with respect to pictures and, therefore, there is no reason for it. But when important matters come up, when something arises that I consider important, I write a memorandum.

Q. You prepared that form letter and those memoranda for this lawsuit, didn't you?

A. No, I wouldn't say so.

Q. That is what you had in your mind, wasn't it? A. No, I don't believe it was.

Q. Did anybody tell you to do it for that purpose? A. No.

Q. Mr. Lehman, clearance is an agreement between a distributor and an exhibitor that a picture licensed to the exhibitor will not be permitted to play in another theatre until after the elapse of some days, isn't that what clearance is?

A. No, I don't agree with that. Clearance is not primarily an agreement between an exhibitor and a distributor.

The Court: What is clearance?

The Witness: Clearance is either a demand from the distributor which in some cases the exhibitor

(Testimony of Sidney Lehman.)

agrees to because [2096] he can't help himself. Or, it is a demand from the exhibitor which a distributor may agree to if he thinks it is fair, but very seldom you will find that it is an agreement between a distributor and an exhibitor.

Q. (By Mr. Mitchell): Let us talk about it for just a moment from the standpoint of the man in favor of whom clearance is granted.

You license pictures for a large number of theatres, don't you? A. Yes, I do.

Q. How many?

A. Well, at the present time, maybe 40 or 42.

Q. How many in 1950 and '51?

A. Maybe 50 or 55.

Q. Some of those theatres for whom you—for which you licensed pictures have clearance over subsequent run theatres, surely, don't they?

A. Yes.

Q. All right. Now, let us talk about the theatre in favor of whom the clearance runs.

Either in writing or by custom or by statement, a distributor arranges with the prior exhibitor so that the same picture can't play in some other theatres, until after the elapse of a period of time. That is in favor of the prior theatre, isn't that correct? [2097]

A. That would be in favor of the prior theatre.

Q. And that would be what clearance would be in favor of the prior theatre? A. Yes.

Q. Now, that is an advantage to the prior theatre isn't it? A. Yes.

(Testimony of Sidney Lehman.)

Q. And it is something that he bargains for and pays for, isn't it?

A. Well, not necessarily, no.

Q. Well, if he makes an arrangement with this prior exhibitor, makes an arrangement with the distributor that no other theatre in a certain area shall play until after the elapse of so many days, that is something that they discuss in their bargaining?

A. If he makes an arrangement.

Q. If he makes an arrangement. That is part of the bargain?

A. If he makes an arrangement.

Q. And he pays for that, doesn't he?

A. Well, that is a subject of negotiation. I don't know.

Q. That is right. And you understand what it means?

The Court: That is one of the things he gets when he licenses the picture. [2098]

Mr. Mitchell: Sure.

The Court: You say he pays for it. He pays for everything.

Mr. Mitchell: That is right. He pays for the use of the picture and the right not to have anybody else use it for so many days, right?

The Witness: Well, if he makes that arrangement.

Q. (By Mr. Mitchell): That is right. That is what we are talking about, Mr. Lehman.

The Court: May I ask a question. Do you know of any pictures you can use without a clearance?

(Testimony of Sidney Lehman.)

The Witness: Yes, sir.

The Court: There are such pictures?

The Witness: You mean as far as the Paradise is concerned?

The Court: Generally.

The Witness: Surely.

The Court: All pictures are sold subject to clearance, are they not?

The Witness: No, sir.

The Court: They are not?

The Witness: No, sir. We have many situations—well, just take for example the town of Mojave. Mojave is a town 92 miles from Los Angeles, and they can play the picture today or next year or any time. [2099]

The Court: That is because there is no competition between them?

The Witness: All right, then I will give you another example.

The Court: Where there is competition between theatres, there is always clearance, isn't there?

The Witness: Where there is competition?

The Court: Yes.

The Witness: Yes. [2100]

The Court: Where there is competition, there is always clearance.

The Witness: Yes.

The Court: Regardless of what theatre it is.

The Witness: Unless the theatre is playing day and date.

(Testimony of Sidney Lehman.)

The Court: Unless it plays day and date.

The Witness: Yes, sir.

Q. (By Mr. Mitchell): All right. Now you understand what I mean when I used the phrase priority of availability as distinguished from clearance?

A. No. I would like you to explain it.

Q. By that I mean that a picture is licensed to a theatre under an agreement in which the distributor says, "I won't license it to anyone else in an area at the same time," in other words, an exclusive run, but no arrangement whereby there will be an elapse of time. Understand that? A. No.

Q. All right. You never heard of an arrangement for priority of availability without an elapse of time between that exhibitor's run and the next run?

A. Do you mean that an exhibitor can play a picture by arrangement with a film company on a certain play date with clearance over a theatre who can come in on the following day after—— [2101]

Q. After he finishes.

A. ——after the first theatre gets through?

Q. Yes. A. Is that what you mean?

Q. Yes. Well, use Inglewood. Several of these distributors license a 7 day run.

A. That's right.

Q. Exclusively, let us say, to one theatre.

A. Yes.

Q. And then they will license a 14 day run.

A. Yes.

Q. So that if the first theatre plays the picture

(Testimony of Sidney Lehman.)

7 days, then the second theatre can play it on the 8th or 9th or 10th or 11th, and so forth, days.

A. Yes.

Q. What I mean is the first theatre gets a priority of availability. A. Yes.

Q. Do you understand that term now?

A. Yes.

Q. That is a little different than clearance, because there is no elapse of time agreed to?

A. We never differentiate between the two.

Q. I see. You use the word clearance with respect to both of those arrangements, don't you?

A. Yes.

Q. So that it covers both of them.

A. Yes.

Q. But you recognize that there are two different types of exclusivity or priority, don't you?

Mr. Corinblit: Your Honor, I will object to that as being highly speculative. The witness has testified there is no difference between the two terms, and Mr. Mitchell is trying to establish some distinction which doesn't exist.

Mr. Mitchell: Obviously, on the face of it there is a difference. He has already said so.

Q. You recognize the difference, don't you?

The Court: Do you recognize a difference?

The Witness: No, sir.

Q. (By Mr. Mitchell): All right. Now, you spoke about some picture where you talked to Mr. Prince of Fox West Coast asking him to waive

(Testimony of Sidney Lehman.)

clearance. A. Yes, sir.

Q. You understood what the situation was, that Fox West Coast had bought the picture with clearance, isn't that what you understood had happened?

A. Yes, but I was told——

Q. All right, and you were asking him to waive something that he bought, isn't that right?

A. No. [2103]

Q. No? You were asking him to waive the clearance. A. May I explain it to you?

Q. You can answer me yes or no and then you can explain as much as you want.

The Court: He has already said no. He has answered the question no.

Mr. Mitchell: He misspeaks himself, your Honor. He just said under direct examination he asked Mr. Prince to allow him to play the picture, which is to waive the clearance.

The Court: I don't know. He used the words "waive the clearance"?

Mr. Mitchell: I was asking him——

The Court: He said allow him to play the picture. He didn't use the word clearance.

Q. (By Mr. Mitchell): You knew Fox West Coast had clearance, didn't you, on those pictures?

The Witness: Your Honor, may I answer this in my own way?

Mr. Mitchell: Go ahead and answer it yes or no and then explain all you want to.

The Witness: I was told by the branch manager

(Testimony of Sidney Lehman.)

of the company that owned the picture that if Mr. Frank Prince would grant us permission to play the picture with him, it was all right with the branch manager. That is the only way and [2104] the only reason I called Frank Prince. I wouldn't presume to call him without the approval of the company that owned the picture.

Q. (By Mr. Mitchell): You knew he had bought clearance on that picture, didn't you? You have been in the business a long time.

A. I don't know that he bought it or he didn't buy it.

Q. You knew that he had clearance on the picture.

A. He may have. I wouldn't guarantee it.

Q. You knew that is why the distributor said to call him, because he had clearance, isn't that so?

A. No.

Q. How long do you say you have been in this business? A. 39 years.

Q. If the Paradise and La Tijera played day and date on a 7 day run, some percentage of people living between the Paradise and the La Tijera would exercise a choice about which theatre they would go to, right?

A. I would say a small percentage.

Q. The La Tijera would not only draw people from the east of the theatre, but also from the Westchester area, isn't that true?

A. It may. It is possible.

(Testimony of Sidney Lehman.)

Q. And the Paradise on an exclusive 7 day run would draw from Inglewood, Westchester, and the surrounding areas, [2105] wouldn't it?

A. Yes.

Q. And if the Paradise played on a day and date run with the Fox Inglewood, it would draw from a more reduced area, isn't that right?

A. No, sir.

Mr. Mitchell: I would like to read from Mr. Lehman's deposition at page 62, lines 9 to 19.

Mr. Corinblit: Just a minute, counsel. I think you ought to follow the procedure of showing the witness the portion of the deposition and asking him to look at it, just as we have done with each one of your witnesses.

Mr. Mitchell: You don't agree the witness so testified?

Mr. Corinblit: If you will show it to the witness, then we will proceed in the proper manner.

Q. (By Mr. Mitchell): I want to know if you so testified, page 62, lines 9 to 20. You can answer that yes or no. Yes or no.

Mr. Corinblit: Did you so testify, Mr. Lehman?

Mr. Mitchell: I am asking the question.

The Witness: Yes, I testified that.

Mr. Mitchell: All right. I will read it, with permission of the court.

“Q. Now, if instead of having one 7 day [2106] availability in the Inglewood-Westchester area, there were two offered on a particular picture, and

(Testimony of Sidney Lehman.)

one of those availabilities played in the Fox Inglewood and one in the Paradise Theatre, I take it it would be your opinion that the area from which the Paradise Theatre would draw patronage would be reduced somewhat as against the situation where there was just one 7 day availability, is that correct?

“A. Yes.”

Mr. Corinblit: Keep reading, Mr. Mitchell, please, on page 62.

Mr. Mitchell: I am through reading.

Mr. Corinblit: Your Honor, at this point, when there is a question——

The Court: Just mark it and when you get the witness you can back and read it.

Mr. Corinblit: Your Honor, ordinarily at the time, if counsel reads from a portion of a deposition and didn't read the complete deposition, the procedure, as I understand it, is that if counsel won't read it, the opposing side is permitted to read the portion which makes the answer complete. This is excising and I ask that permission, your Honor.

Mr. Mitchell: It is a complete answer.

Mr. Corinblit: I ask your Honor—— [2107]

The Court: All right, go ahead and read it. You can read it faster than we can argue.

Mr. Corinblit: “Q. Or, putting it another way, that the existence of a second 7 day availability in this case playing in the Fox Inglewood would reduce the patronage of the Paradise Theatre on the 7 day availability.

(Testimony of Sidney Lehman.)

“A. No, I wouldn’t say that. It has been our experience that if it is a good picture, an A picture, we can do more business playing an A picture day and date with other theatres that are not too far away than we can by playing, let us say, a B plus picture alone. It is the draw of the picture.”

Q. (By Mr. Mitchell): When the Paradise played pictures on the 21 day availability, you found people in Westchester would not come to the Paradise because they had already seen the pictures in the Inglewood theatres or the other theatres, isn’t that right?

A. In Inglewood or other theatres.

Q. The best advertising a picture can get is word of mouth advertising, isn’t it?

A. Yes, that is reasonable.

Q. And you also used radio advertising to draw people from Inglewood, among other areas?

A. Yes. [2108]

The Court: Mr. Mitchell, does a booker and buyer have to do advertising? I didn’t understand it that way.

Did you have anything to do with the advertising?

The Witness: No, sir.

Q. (By Mr. Mitchell): You knew about it?

A. Only when Mr. Max Schreiber or the theatre manager or possibly Mr. Alex Schreiber discussed it with me, but I did not know about all the advertising they did. We had nothing to do with it.

Q. Your idea of substantial competition is this, that if theatres draw a portion of their patronage

(Testimony of Sidney Lehman.)

from the same area, they are not competitive with one another. It is only when the theatres depend 100 per cent, when one theatre depends 100 per cent upon the same patronage as the other theatre, isn't that your idea of substantial competition?

A. Correct.

Q. It has to depend 100 per cent identity of drawing power? A. Correct.

Q. So that if 50 per cent of the La Tijera's patronage came from the Westchester area, your view could be that the Paradise and the La Tijera are not competitive, right?

The Court: Now; wait a minute. You used the word competitive. Let's use substantially competitive. We are talking about substantial competition. We all agree there may [2109] be a little competition. There may be a few people come, but where do we come into the question of substantial.

Mr. Mitchell: I think it is his view, and I know it is his view, if 50 per cent of La Tijera's patronage came from the Westchester area, your view is that the Paradise and the La Tijera are not substantially competitive, is that right?

The Witness: I don't know that I mentioned the 50 per cent, but it is my belief that the Paradise and the La Tijera are not substantially competitive. [2110]

* * * * *

Q. (By Mr. Mitchell): Now, what you mean—what you mean is, Mr. Lehman, that the La Tijera and the Paradise would not be substantially com-

(Testimony of Sidney Lehman.)

petitive even if 50 per cent of the La Tijera's patronage came from the Westchester area. Isn't that what you mean?

A. Well, I think we proved that the theatres weren't competitive when we both played Born Yesterday and we both did good business.

Mr. Mitchell: I ask that the answer be stricken.

The Court: The answer will be stricken. Answer the question yes or no. Read the question, Mr. Reporter.

(Question read.)

The Witness: I don't believe that the La Tijera and the Paradise Theatre are substantially competitive.

Mr. Mitchell: I move the answer be stricken and the witness required to answer the question.

Mr. Corinblit: I think Mr. Mitchell is badgering the witness at this stage, and I object to it for that reason.

The Court: Now, just a minute, just calm down.

This is a hypothetical question and I think Mr. Mitchell is entitled to an answer.

Your understanding of substantial competition and my understanding of substantial competition may be different—probably is different because I haven't found any two people who will agree as to what substantial competition means.

Now, all he is trying to find out is what you mean by "substantial competition".

Now, do you mean it has to be 50 per cent that one theatre has to take from another—that is one

(Testimony of Sidney Lehman.)

theatre takes 50 per cent of the patronage of another theatre before it becomes substantially competitive.

The Witness: He mentioned "if" and I don't like guesswork.

The Court: I know, but this is pure guessing. We have to guess.

The Witness: If one theatre took 50 per cent of the patronage of another theatre they would be substantially competitive.

The Court: How about 25 per cent?

The Witness: No, I don't believe you would call that substantially competitive.

The Court: Where is the breaking point between 25 and 50 per cent?

The Witness: I would say around 33 $\frac{1}{3}$ per cent.

The Court: There is no substantial competition in your opinion unless one theatre takes 33 $\frac{1}{3}$ per cent of the patronage of another theatre?

The Witness: Or more.

The Court: Is that satisfactory?

Mr. Mitchell: I would like to show him his testimony.

Q. I would like to show you your testimony at page 31, lines 20 to 26, and ask you if you so testified. You can answer that yes or no.

A. Yes, I testified to that.

Mr. Mitchell: With your permission, your Honor, I would like to read that portion to the jury.

The Court: You may do so.

Mr. Mitchell: "Q. It wouldn't make any differ-

(Testimony of Sidney Lehman.)

ence to your opinion with respect to competition between the La Tijera and the Paradise, for example, if as much as 50 per cent of the La Tijera patronage came from the Westchester area you would still hold the opinion that they were not competitive?

“A. That is right.” [2114]

* * * * *

The Court: This is a difficult question as to whether or not these theatres are in competition or substantial competition. What do you mean by substantial competition? I don't know. It is purely a question of fact and you are the ones who are going to have to determine that, not me.

You don't have to take the testimony of this witness or any other witness but take the testimony of all the witnesses and consider the reasons they give as to why they believe the [2116] theatres are in competition or substantial competition or are not in competition or substantial competition, and determine in your own minds whether or not the Paradise Theatre was in substantial competition with these other theatres.

Mr. Mitchell: And your Honor, in determining the question of conspiracy, the matter of substantial competition may not be determined.

* * * * *

Q. (By Mr. Mitchell): After you started buying and booking for the Paradise Theatre, Mr. Lehman, Warner Bros. offered you the opportunity to bid for each 7 day availability that came off the Warner Bros. production line, isn't that right?

(Testimony of Sidney Lehman.)

A. I believe so, yes.

Q. And the same is true as to Universal, isn't that right? A. Yes.

Q. And the same is true as to Paramount, isn't that right? [2117] A. Yes.

Q. And Loew's told you that any time you wanted to bid for their pictures, you could do so, isn't that right? A. Yes, on the 7 day.

Q. On the 7 day availability, yes. And these companies, at least Universal and Paramount and Warners all offered you the opportunity to bid the 14 day availability, isn't that right?

A. The opportunity to buy or bid for it?

Q. Well, bid for it. A. Yes.

The Court: Mr. Mitchell, do I understand from that question that there was a different policy relative to 14 and 7 day availabilities? In other words, you had to bid on 7 but you could negotiate on 14?

Mr. Mitchell: There was bidding on the 14 day run also.

The Court: They didn't say you have to bid on 7 day but we will negotiate on 14 day?

Mr. Mitchell: No. They said if you want a 7 day run you can bid for that. They said if you want a 14 day run you can bid for that. And that was done under different plans which your Honor is aware of.

The Court: I got a little different meaning from your question and that is why I broke in.

Q. (By Mr. Mitchell): You licensed quite a number of 14 [2118] day runs, didn't you?

(Testimony of Sidney Lehman.)

A. Yes, sir.

Q. And some of those you licensed by bidding?

A. No, sir.

Q. You licensed all of the 14 day runs then that you got by negotiation?

A. I wouldn't want to—I believe all of them, but there may have been one or two, but I believe all of them, the way that expression that I licensed them, I licensed practically all of them on negotiation.

Q. In some instances, the distributors didn't get an adequate bid and said that they were ready to negotiate for the picture?

A. I wouldn't know about that.

Q. They just came and told you they were ready to negotiate for the picture? A. Yes.

Q. And the 21 day runs you got by negotiation?

A. Yes.

Q. Now, you spoke about out-booking the Fifth Avenue—the picture Santa Fe. The Fifth Avenue on that occasion played Santa Fe and Fury of the Congo both on 7 day availability, isn't that right?

A. Yes.

Q. And the Paradise played Santa Fe and Father's Little [2119] Dividend, isn't that right?

A. Yes, sir.

Q. That was a better bill than the Fifth Avenue had?

A. Well, Father's Little Dividend was on a 27 day availability. The reason that the Fifth Avenue pulled the picture was the fact that we were permitted to play it day and date with them.

(Testimony of Sidney Lehman.)

Q. And you had a better bill?

A. Well, when you say "A better bill," I don't know. We had a bill where one picture had played in the area a few weeks prior to the opening of our show and therefore it eliminated a certain number of people who wouldn't come to see Father's Little Dividend the second time in order to see Santa Fe.

Q. But when you say you "out-booked" the Fifth Avenue, what did you mean?

A. Oh, I don't know, just that it is an expression that I use. But I don't think that it means too much one way or the other. I think the reason that the Fifth Avenue——

Q. I am not asking you to speculate on the reason. I am asking you to tell me what you mean when you say you out-booked them.

A. Well, Santa Fe and Fury of the Congo are two action pictures. Now, that would only interest people who were looking for red blooded entertainment. [2120]

Now, Santa Fe and Father's Little Dividend might appeal more to a man and his wife and their family because the wife and daughter would probably rather see Father's Little Dividend than Fury of the Congo or Santa Fe. The man and his son would prefer to see Santa Fe and it makes a rounded show to my estimation, anyway.

Q. Well, in your opinion yours was a better double bill than the Fifth Avenue double bill?

A. Yes, with the reservation that the picture Father's Little Dividend had played the area before

(Testimony of Sidney Lehman.)

and naturally that eliminated just so many people who wouldn't see it the second time.

Q. Now, with respect to Paramount, Mr. Lehman, your first request made to Paramount to negotiate was this form letter of March 26, 1951—the Born Yesterday letter, is that right?

A. No, sir.

Q. That was your first written request?

A. Well, I don't know about that. You see, when we assumed the buying and booking of the Paradise Theatre, there is a certain form that the Paradise Theatre is requested to sign in order that the film company may know that we are the accredited buyers and bookers.

Now, when that form was either taken or sent to the company we may have informed them at that time just how we [2121] wanted to buy and book.

Q. All right. At the time you wrote your letter of March 26, 1951, to Mr. Taylor, the so-called Born Yesterday letter, you had been, prior to that, you had been playing on a 21-day availability, hadn't you? A. Yes, I believe so.

The Court: May I ask a question, Mr. Mitchell?

Mr. Mitchell: Yes.

The Court: In your duties as a buyer and booker, do you give any consideration as to whether or not the profit of the theatre—that the theatre is making a profit. Do you consider the policy of the theatre, whether it is better to try to run on a 7 day availability or to run upon a 21 day availability or run upon a later availability or lower admission

(Testimony of Sidney Lehman.)

prices, or do you just give consideration to the fact that you want to buy and book the best pictures available?

The Witness: No, sir. I have to be cognizant of the profit by virtue of the fact that if I buy pictures that don't bring in enough people to the box office, I will be fired. [2122]

The Court: Well, I know, but who establishes the policy. Now, you have got 21 day. When you first started buying and booking, was the theatre on a 21 day policy?

The Witness: Your Honor, I don't know very much about what happened prior to our coming into the picture.

The Court: When you came into the picture, what were they buying? Weren't they trying to get pictures on 7 day or 21 day?

The Witness: The only thing that they could get at that time was 21 day pictures.

The Court: When you came in, was that what they were playing?

Mr. Mitchell: He means without bidding for them.

Q. You mean without bidding for them?

The Court: That is upon negotiations.

The Witness: Your Honor, I don't know even the name of the picture that played prior to the day I took over the theatre, and I am sincere about that.

The Court: When you came in they were playing pictures on 21 days, is that correct?

The Witness: I don't know.

(Testimony of Sidney Lehman.)

The Court: When you first bought a picture did you buy it on 21 days?

The Witness: Yes, sir.

The Court: How long did you continue buying on 21 [2123] day availability?

The Witness: About two to two and a half months.

The Court: What made you change from the 21 day availability to another availability?

The Witness: Well, your Honor, we were trying to get 7 day availability pictures, but we were unsuccessful. The film companies wouldn't give them to us.

Mr. Mitchell: He doesn't mean they wouldn't give them to him. He means they wouldn't give them to them unless you bid, is that right?

Mr. Corinblit: Would your Honor instruct the jury that what Mr. Mitchell says is not evidence?

The Court: I will instruct the jury that you are not to consider the statements of counsel as evidence. That includes opening statements, arguments made between counsel and arguments made between counsel and the court. That is not evidence. The only evidence you are to consider is the evidence you get from the witness stand.

Mr. Mitchell: Your Honor, in view of these statements, I would like to say that he just got through saying that all these companies offered their pictures by bid.

The Court: I will try to clarify that.

Mr. Mitchell: Please, your Honor.

(Testimony of Sidney Lehman.)

The Court: When you say you couldn't get the pictures, you mean you couldn't get them on a negotiation policy? [2124]

The Witness: Yes.

The Court: It would have been possible for you to bid, and if you had been the successful bidder, you could have gotten the pictures?

The Witness: Yes, sir. [2125]

* * * * *

Q. (By Mr. Mitchell): In your Born Yesterday letter to Paramount, you said, "I would like to negotiate for your pictures September Affair and The Redhead and the Cowboy to play 7 days after first run Los Angeles closing, or, if the request is too late for this availability, I would like to negotiate with you for your next release to run 7 days after Los Angeles first run closing."

You had a conversation with Mr. Taylor, the branch manager of Paramount Exchange, and he told you he had already licensed September Affair and The Redhead and the Cowboy, is that right?

A. Yes.

Q. Then you mentioned a picture named Molly. That is a picture that you didn't attempt to license in your theatre on any availability, isn't that right? You didn't play it on any availability? [2127]

A. He didn't offer it to me.

Q. You are the buyer. Didn't you go around and try to get Molly from him on any availability?

A. He is the salesman and he is supposed to come and sell it to me.

(Testimony of Sidney Lehman.)

Q. You sit back and wait, is that your policy?

A. Yes, sir.

Q. I see. You don't try to get the pictures, then?

A. A salesman calls on a buyer. A buyer doesn't run after a salesman as a rule, Mr. Mitchell.

Q. That is the way you operate? A. Yes.

Q. Molly, that picture named Molly is what is known in the trade as a dog, isn't that right?

A. Yes, sir.

Q. And a dog is a very poor picture in the trade, isn't it?

The Court: You don't want to put anything in front of that dog, do you?

Q. (By Mr. Mitchell): Is that right?

A. You said Molly is a dog?

Q. That is what you said, isn't it?

A. I agree with you.

Q. What do you mean by that?

A. What do I mean by a dog? [2128]

Q. By calling Molly a dog.

A. I would say it is a picture that isn't of the highest grossing caliber.

Q. That is what is called a British understatement, isn't it, isn't that right? A. Yes.

Mr. Corinblit: Whether it is an understatement or a British understatement.

Q. (By Mr. Mitchell): The next picture——

The Court: Just a minute, Mr. Mitchell. When you refer to a picture as a dog or being an undesirable picture, you are referring only to it as a box office attraction.

(Testimony of Sidney Lehman.)

The Witness: Yes, sir.

The Court: That is the money that comes into the box office.

The Witness: Yes, sir.

The Court: You may have a very fine picture from an artistic standpoint, but yet it would be a dog because it didn't draw anything at the box office.

The Witness: Yes, sir.

The Court: All right.

Mr. Corinblit: It might be a turkey, your Honor, if it was not a dog.

Q. (By Mr. Mitchell): The next picture, Samson and Delilah, that picture Paramount licensed to you? [2129] A. Yes, sir.

Q. By negotiation? A. Yes, sir.

Q. Not bidding, negotiation. A. Yes, sir.

Q. They rejected the bids that they got on that, did they tell you that? A. No.

Q. They just asked you if you would like to buy it? A. Yes, sir.

Q. All right. Now, the next picture of Paramount is Lemon Drop Kid. I would like to ask you to look at a memorandum of Al Taylor's which has been marked for identification as defendant Paramount's Exhibit E-19 and see if that refreshes your recollection about The Lemon Drop Kid. [2130]

Mr. Corinblit: This is a memorandum of Mr. Taylor, is that correct?

Mr. Mitchell: Emphasize that so—the judge understands.

(Testimony of Sidney Lehman.)

(Document handed to the witness.)

Q. (By Mr. Mitchell): Now, do you remember that on The Lemon Drop Kid that Mr. Taylor came to you and asked you if you were interested in negotiating a deal for your theatre?

A. Well, frankly I don't, but it is possible that he did without my recalling it.

Q. Do you remember him telling you that—let us go back for just a minute.

Paramount was offering at that time two seven-day runs in the area? A. Yes.

Q. Do you remember that on The Lemon Drop Kid him telling you that the Academy had won one of the bids—it had won the bid on one of the runs on The Lemon Drop Kid? A. No, I don't.

Q. I see. Did you make a memorandum of that conversation?

A. I couldn't very well if I don't remember it.

Q. I understand, but do you have in your files a memorandum of that conversation with Mr. Taylor? [2131]

Mr. Corinblit: There is no testimony there was such a conversation, Mr. Mitchell. I object to the question on the ground it assumes a fact not in evidence.

The Court: Overruled. So far as you know, do you have in your file any memorandum of any conversation you had with Mr. Taylor in regard to this picture?

The Witness: No, because all my files should be here. There isn't anything that I didn't send down.

* * * * *

(Testimony of Sidney Lehman.)

Q. (By Mr. Mitchell): At the recess, Mr. Lehman, we were talking about the Paramount picture Lemon Drop Kid. A. Yes, sir.

Q. I want to show you Plaintiff's Exhibit 3-L, a document taken from your files, and ask you if you recognize it.

The Court: Is that in evidence?

Mr. Mitchell: No, sir, it is not. It is marked for identification.

The Witness: Yes, I recognize it.

Mr. Mitchell: I will offer it in evidence.

The Court: It may be received in evidence.

The Clerk: Is that one of your exhibits or as the plaintiff's exhibit?

Mr. Mitchell: It is his document. I will offer it with the plaintiff's number. It doesn't make any difference what number it has.

The Clerk: Plaintiff's Exhibit 3-L.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit 3-L.)

Mr. Mitchell: First we will identify this and then I can read portions of it.

Q. Mr. Lehman, this is a request for bids sent to you by Paramount for Lemon Drop Kid on the 14 day availability, right? A. Yes.

Mr. Mitchell: I would like to read portions of it, if I may, to the jury.

This document is headed Paramount Film Distributing Corporation, request for offer, and it is dated April 16, 1951. It is addressed to Harry L. Rackin—

(Testimony of Sidney Lehman.)

Q. Mr. Rackin in your partner?

A. Yes, sir.

Q. And Earl J. Johnson. Mr. Johnson was the buyer for the La Tijera, wasn't he? A. Yes.

Q. And Marco Wolff and Fred Stein—he was the buyer [2134] for United Artists?

A. Yes.

Q. Bert Pirosh. Gus Diamond. Who is Gus Diamond?

A. Gus Diamond was and still is the buyer for the Century Drive-In Theatre and the Vermont Drive-In Theatre. I don't know if he had the Studio at that time or not.

Q. Max Laemmle, he is the buyer for another drive-in?

A. No. That would be the Ritz Theatre in Inglewood.

Q. The Ritz Theatre in Inglewood. Jack Berman?

A. I guess Jack Berman at that time was the owner of Centinela Drive-In Theatre.

Mr. Mitchell: This document reads:

“We invite each of you to submit any offers you may desire to make with respect to the motion picture Lemon Drop Kid for the run 14 days following first run Los Angeles and Hollywood closing.”

Underneath that it says, “Awarded Academy and Southside Theatres on 7 day availability.” There is a list of theatres to which this offer is made.

Q. Now, you knew, then, at that time that in respect of the 7 day availability the two Paramount

(Testimony of Sidney Lehman.)

7 day runs had been awarded to the Academy and Southside?

Mr. Corinblit: Just a minute, your Honor. What time are you referring to, counsel? I will object to the question as ambiguous, your Honor. [2135]

Mr. Mitchell: At the time of the receipt of this request for offer.

Mr. Corinblit: Whenever it was received.

Mr. Mitchell: It is dated April 16, 1951.

Q. At or about that time, as stated in the request for offer, you knew that the Academy and Southside had bought the 7 day run, isn't that right?

A. I may have. I don't particularly recall, but I may have.

Q. Well, you saw this document?

A. I don't know that I did. That is not my handwriting.

Q. It is Mr. Taylor's signature on here.

A. Where it says "File Paradise" is not my handwriting.

Q. You actually bought the 14 day run, didn't you?

A. I don't recall. I would have to look at my records to find out. [2136]

Q. Then I would like to show you a document marked for identification, Paramount Exhibit E-17, dated May 7, 1951, two or three weeks later, and ask you if you sent that document to Mr. Taylor?

A. Yes, I sent it to him.

Mr. Corinblit: May I see it, Mr. Mitchell?

(Testimony of Sidney Lehman.)

Mr. Mitchell: Yes, I am sorry.

I offer this document in evidence, your Honor.

The Court: It may be received in evidence.

The Clerk: Paramount Exhibit E-17 in evidence.

(The document heretofore marked Paramount Exhibit E-17, was received in evidence.) [2137]

* * * * *

Q. (By Mr. Mitchell): Now, in view of this April 16th request for offers specifying that this picture had at that time been awarded to the Academy and Southside, you knew on May 7, of course, that the 7 day run of Paramount was no longer available, didn't you?

A. No, I don't believe I did.

Q. All right. Now, on or about June 5, Mr. Taylor told you that the picture Appointment With Danger was open for Paradise to negotiate for it on a 7 day run. Do you remember that?

A. Well, I remember discussing it with him. I don't remember the exact date.

Q. I am talking about negotiations and not bids.

A. Yes.

Q. You remember offering him 35 per cent for the picture? A. Yes, I do.

Q. And you remember when you called Mr. Taylor he told you that the picture had been awarded to the—or, had been sold to the Academy and the Southside and that you couldn't have it inasmuch as they were only willing to license two 7 day runs, do you remember that? [2138]

(Testimony of Sidney Lehman.)

A. I remember that, but there is more to it than that.

Q. Yes, there is. You remember that much, do you? A. Yes, I do.

Q. We will get to the rest of it. Then you remember the next day that he called and told you that there had been a change in the playing of the picture and that you could have Appointment With Danger on the 7 day availability but that you would have to pay 40 per cent for it? A. Yes.

Q. That was a negotiation? A. Yes.

Q. That is what you wanted to do?

A. Yes.

Q. Was negotiate? A. Yes.

Q. And then he sent you a contract covering Appointment With Danger, didn't he, asking you to sign it? A. I don't recall.

Mr. Mitchell: Could I have Defendant Paramount Exhibit E-21, please.

Q. I will show you a letter dated June 6, 1951, from Mr. Taylor to you and ask you if you recognize that?

A. Yes, I recognize the letter.

Q. And that refreshes your recollection?

A. I believe so. [2139]

Q. So that you can now state on the picture Appointment With Danger, Mr. Taylor sent you a contract for a 7 day availability for your signature? A. Yes.

Q. Then later on he told you that the picture

(Testimony of Sidney Lehman.)

would not be available to you until June 20th. Do you remember that?

A. I remember something about it.

Q. And you told him you already had the—I guess it was the Columbia picture *Brave Bulls* set for that date?

A. Yes, sir.

Q. And that you couldn't play *Appointment With Danger*?

A. Yes. [2140]

The Court: May I ask the witness a question?

Mr. Mitchell: Certainly.

The Court: Suppose you make a bid upon a picture and you get it and then you discover you can't play it. Do you have to pay for the picture anyway?

The Witness: Yes, sir.

The Court: On what basis? If you have got it on a percentage, and you don't play it, there is no percentage. How do you work out a basis for paying?

The Witness: The companies generally take a number of pictures and strike off an average and that is what you will pay for your percentage of the average business they feel you should have done on that basis.

The Court: So if you bid for a picture and you get it and for any reason you can't play it——

The Witness: You are still obligated.

The Court: The distributors won't take it back and relieve you of the contract?

The Witness: No, sir.

The Court: You have to pay for it.

The Witness: Yes, sir.

(Testimony of Sidney Lehman.)

Q. (By Mr. Mitchell): You don't mean to say you bid for Appointment With Danger?

A. No, I didn't bid on that picture.

The Court: I am asking the difference between [2141] negotiation and bidding. I wanted to know if they bid for a picture and got it whether they had to pay for it or not.

Q. (By Mr. Mitchell): In June 1951, the Paramount picture Last Outpost became available on the 7 day run, isn't that correct?

A. I don't know for sure. It is possible.

Q. Let me show you a handwritten memorandum in the handwriting of Mr. Taylor here and see if this doesn't refresh your recollection as to whether that picture was offered to you by negotiation.

Mr. Corinblit: Before you answer, Mr. Lehman, I would like to take a look at the document.

Mr. Mitchell: I'm sorry.

Q. Does that refresh your recollection that the picture Last Outpost was offered to you by Mr. Taylor for negotiation for a 7 day run?

A. No, it doesn't. It may have been offered, but I don't recall it.

Q. You don't recall. A. No, sir.

Q. You made no memorandum about that?

A. Not that I can recall.

Q. Another picture in the summer of 1951, in July 1951, Paramount picture, available on the 7 day run, was Peking Express. I will also show you a memorandum of Mr. Taylor's and [2142]

(Testimony of Sidney Lehman.)

see whether that refreshes your recollection as to whether you were given an opportunity to negotiate for the 7 day run on that picture.

A. It is possible, but I just don't recall it.

Q. You didn't make any memorandum about that?

A. Not if I don't have one.

Q. There was also a picture available, distributed by Paramount about that time, called Trio. Trio was a so-called art picture?

A. Yes, sir.

Q. By an art picture you mean a picture of a type that appeals to only a limited class of people?

A. Yes, sir.

Q. You were not interested in art pictures for your theatre?

A. I don't think the Paradise has that trade.

Q. The answer is that you weren't interested in that type picture?

A. No.

Q. Another Paramount picture available on a 7 day run at that time was called War Path. I will show you a memorandum of Mr. Taylor's on War Path and see whether that refreshes your recollection that the picture was offered to you and you told Mr. Taylor that the Paradise was already booked for that date and couldn't use it—offered to [2143] you by negotiation, for negotiation.

A. It is possible. I don't recall it.

Q. And you didn't make any memorandum of it?

A. No, sir, not if it isn't here.

Q. I call your attention to another Paramount picture, Here Comes the Groom. Do you remember that picture?

A. Yes.

(Testimony of Sidney Lehman.)

Q. Do you remember that you negotiated in your style a deal with Paramount for the 7 day run of that picture?

A. I have to refer to my records.

Mr. Corinblit: On the 7 day availability?

Mr. Mitchell: That's right.

Q. I will show you here a memorandum of Mr. Taylor's dated September 7, 1951, and ask you whether that refreshes your recollection that the picture was offered to you by negotiation and that you made an offer and Paramount accepted it.

A. Excuse me. Wasn't this period up to August 1951?

Mr. Corinblit: What is the date of that?

The Witness: September 7.

Mr. Corinblit: Yes. Mr. Mitchell, you appreciate that this picture was not played in the Paradise during this period.

Mr. Mitchell: Well, it was offered to him and he purchased it by negotiation during this period, I think.

Q. Didn't you? Isn't that a fact? [2144]

A. May I look at this?

Q. Sure. That is what I want you to do.

A. Thank you. I am looking for a date on here.

Q. That is a typewritten copy of this one.

A. This is the date.

Q. Do you have any recollection of negotiating with Paramount for Here Comes the Groom and buying the picture on a 7 day availability?

(Testimony of Sidney Lehman.)

A. No, frankly, I don't, but if I could refer to my records, I would.

Q. What records do you need?

Mr. Corinblit: These are the records right here, counsel.

Q. (By Mr. Mitchell): Aren't you willing to say now, Mr. Lehman, that on numerous occasions Paramount offered you 7 day runs by negotiation?

A. Well, those that they offered me, I was very happy to take advantage of.

Q. And that they did that on numerous occasions?

A. On the few occasions you mentioned, yes.

Q. At least?

Mr. Corinblit: Just a minute, your Honor. I object to that as speculative and a conclusion. The witness has testified on those occasions they were offered. I don't know what the—— [2145]

Mr. Mitchell: A few moments ago you didn't even say that. I thought maybe he would say the rest.

The Court: Read the question.

(Record read.)

Mr. Corinblit: And unintelligible.

Mr. Mitchell: Well, read the preceding question.

(Record read.)

Q. (By Mr. Mitchell): On at least those occasions?

The Court: Objection overruled.

The Witness: Yes.

Mr. Mitchell: That's all. [2146]

(Testimony of Sidney Lehman.)

Cross Examination

Mr. Johnston: Mrs. Smith, may I have Exhibit 18-G, please. I believe you put this in evidence, Mr. Corinblit.

Mr. Corinblit: Yes.

Q. (By Mr. Johnston): I show you a letter addressed to you, Mr. Syd Lehman, which has been put in evidence, from Mr. Clyde Eckhardt of Fox, dated April 10, 1951.

There is no question in your mind but what you received this document, is there, Mr. Lehman?

A. May I read it?

Q. Certainly.

A. Thank you. Yes, I received that letter. [2147]

* * * * *

Q. (By Mr. Johnston): Now, in your opinion based on your experience in this business, isn't it true that a clearance of the Loyola Theatre over the Paradise Theatre of 21 days is reasonable?

A. No, sir.

Q. Would you say it is unreasonable?

A. Yes, sir. [2748]

Q. I am going to call your attention to your deposition which you gave—may we have the original, Mr. Corinblit?

Mr. Corinblit: Yes. May I read what you are going to show the witness?

Mr. Johnston: Yes, certainly. Starting at line 17 on page 324 through line 4 on page 327.

Mr. Corinblit: All right.

Q. (By Mr. Johnston): I will place before you

(Testimony of Sidney Lehman.)

the portion of the deposition, Mr. Lehman, which I would like to have you read and so you may get it again, I ask you to read on page 324, starting at line 17, through page 327, at line 4.

A. Do you want me to read this?

Q. To yourself.

A. Down to what line on 327?

Q. Line 4. A. Yes, I have read it.

Q. You so testified, did you not, on May 24th of this year? A. Yes.

Mr. Johnston: With the court's permission, I should like to read the indicated portion.

The Court: Very well.

Mr. Johnston: (Reading):

“Q. Now, Mr. Lehman, calling your attention to the Paradise and Loyola Theatres — and they are how far apart? [2149]

“A. Three city blocks.

“Q. Now, if either of those houses played on a first run basis, and I am speaking again of the period of 1950 and 1951, in your opinion would the house which played first run be entitled as a matter of reasonable protection to have 21 days clearance over the other house?”

And then Mr. Corinblit interposed an objection which, unless you want me to read, I will omit.

Mr. Corinblit: You can omit the colloquy between counsel.

Mr. Johnston: The witness answered:

“Well, if Loyola played a picture first run they would be entitled to a reasonable clearance.

(Testimony of Sidney Lehman.)

“Q. If the Paradise Theatre played a picture first run it would be entitled to a reasonable clearance over the Loyola, isn’t that right?”

And then Mr. Corinblit objected again, which I will omit.

The witness answered:

“Yes, that is correct.

“Q. It would work both ways” and the answer was, “Yes.”

“Q. Is it your opinion that the 21 day protection for either of the theatres would be unreasonable—would be reasonable or would have been reasonable in 1950 and 1951? [2150]

“A. Well, if I recall at the Paradise we never asked for any number of days clearance.

“Q. I am not asking you that, Mr. Lehman. I am asking you for your opinion as an expert and as an experienced man in this business——”

And then Mr. Corinblit and Mr. Westbrook indulged in a discussion which I won’t bother to read, and I participated, too, I see.

Then the witness asked to have the question re-read, which the reporter did, and then the witness, after this discussion, said:

“Well, that is more or less of a matter of guess work. Some people might consider 14 days clearance, some people might consider 21 days clearance.

“Mr. Johnston: Let me put it this way: In other words, you wouldn’t consider it unreasonable in your opinion, is that right?

“The Witness: You are now talking about be-

(Testimony of Sidney Lehman.)

tween the Paradise and the Loyola," and I said:

"Just those two theatres, yes.

"The Witness: I would say it is not unreasonable." [2151]

* * * * *

Q. (By Mr. Johnston): Now, on direct examination, if I heard you correctly this morning, you mentioned in some detail a conversation you had with Mr. Clyde Eckhardt. I believe that was some time in 1951, on the occasion on which we took your deposition or I should say I questioned you on May 24th of this year. You didn't remember what was said at that conversation, did you?

A. (No answer.)

Q. Maybe I should show you the deposition.

A. I wish you would. [2152]

Mr. Johnston: I am going to refer here to page 332, Mr. Corinblit, for your edification, particularly lines 18 to 22.

Q. (By Mr. Johnston): Would you turn to that, Mr. Lehman? You have that before you?

A. Yes. 332?

Q. Page 332, lines 18 to 22. A. Yes.

Mr. Johnston: Could I read the portion indicated, your Honor?

The Court: Yes.

Mr. Johnston: This won't be as long as the last.

Q. So that you can't remember anything as to any of the conversations you had with Mr. Eckhardt, Mr. Wall or Mr. Sudman with respect to product of the Paradise Theatre?

(Testimony of Sidney Lehman.)

A. No, not at this time.

Mr. Corinblit: Well, now——

Mr. Johnston: I beg your pardon?

Mr. Corinblit: At the top of page 332 you asked a question pertaining to the same subject, Mr. Johnston.

Mr. Johnston: Yes. I asked quite a few pertaining to that and collateral subjects all the way through the deposition.

Mr. Corinblit: Would you like to read that question and answer? [2153]

Mr. Johnston: I will read the whole deposition if you want. If you will accord me the privilege of going ahead in my own way, I would appreciate it.

Mr. Corinblit: Then, your Honor, I will object to this procedure. Put it this way. I would like the privilege again here, where counsel pulls out a question from the middle of the page, to have the opportunity of reading a question and answer in order that the jury may have all the information. I can't understand this objection to having the full matter presented.

The Court: Do you want to read part of the record?

Mr. Corinblit: Yes, sir, just a question and answer.

The Court: Go ahead and read it.

Mr. Corinblit: Thank you, sir.

Mr. Johnston: Well, now, if you read part, then I suppose I can read some more, too, Mr. Corinblit?

(Testimony of Sidney Lehman.)

Mr. Corinblit: Yes, sir.

Mr. Johnston: Is that all right?

Mr. Corinblit: That's all right. There is only one question I am interested in here, although there are a great many things you covered. Top of 332 is what I had reference to.

“Q. (By Mr. Johnston): I am aware of the fact you bought them. I am simply interested in [2154] knowing if you can tell me what you remember of what you said and what he said.

“The Witness: No, but I do recall that on a number of occasions where pictures did not play the Loyola Theatre that I discussed same with either the three gentlemen I mentioned or one or two of the three and in some cases we made deals.”

Mr. Johnston: Then I will go ahead, if I may, Mr. Corinblit, and I will read line 11 on the same page.

“Q. Can you remember anything more specific than that with respect to these conversations?

“The Witness: Not at this moment.”

And then I asked the question, “You have no notes that would refresh your recollection as to that?

“No. If they are not here, I don't have them.”

Q. (By Mr. Johnston): Do you have any notes on that? You had a number of other notes and I wondered if you might have on this?

A. Whatever notes I had, Mr. Johnston, are here.

(Testimony of Sidney Lehman.)

Q. You don't recall making a memorandum of this conversation, do you?

A. No, not if there isn't a memorandum on it.

Mr. Johnston: Mr. Corinblit, I take it inasmuch as you haven't produced one, there isn't one, to your knowledge?

Mr. Corinblit: You have all the memoranda, counsel.

Mr. Johnston: I don't have any.

Mr. Corinblit: In the files. I might say you have had them for about six months.

Mr. Johnston: Well, I have never had them.

The Court: Let's get the record straight. You have had access to them.

Mr. Johnston: They were in the file, I think, but I didn't see that one, if there was one.

Q. Now, were you familiar in general, Mr. Lehman, with the pictures played at the Loyola Theatre starting with the first of the year 1950 up through September of—I beg your pardon—starting with the first of the year 1951—that is when you started buying and booking for the Paradise Theatre, isn't it? [2156] A. Yes.

Q. About that time? A. Yes.

Q. Are you familiar with the pictures that played at the Loyola Theatre in general from that period up through September of the same year, 1951? A. I would think so.

Q. Is it your best memory that during all of that period the top half of the bill at the Loyola was a Fox picture? A. I would believe that.

(Testimony of Sidney Lehman.)

Q. I have here, and this may help you, if you wish to refer to it, a play-off for the period I am asking you about. In fact, it runs to the end of the year——

The Court: Maybe Mr. Corinblit will stipulate.

Mr. Corinblit: Your Honor, not only can we stipulate that, but in evidence in this case is a complete comprehensive play-off of the Loyola, and it was stipulated to. I don't understand that there is any problem on it.

The Court: You will stipulate the top half of the bill was Fox pictures during this period?

Mr. Corinblit: Your Honor, if you will let me take a look at this exhibit first.

Mr. Johnston: Would you like to look at this one? It may save a little time. [2157]

Mr. Corinblit: Here it is. You are limiting the question to what period?

Mr. Johnston: For the present, just starting with the first of the year, January 1951, through September of the same year.

Mr. Corinblit: You want to cover through September 1951? No, sir. I will not so stipulate. The picture *Cyrano De Bergerac* played July 27 to 8-7-51, and that was a United Artists picture.

Mr. Johnston: What was the date?

Mr. Corinblit: 7-27 to 8-7-51.

Mr. Johnston: You are right.

Mr. Corinblit: Thank you.

Mr. Johnston: Is there any other correction you wish to make as to my statement, Mr. Corinblit?

(Testimony of Sidney Lehman.)

I see one here myself I overlooked, a Republic picture, Fighting Coast Guard, something like that.

Mr. Corinblit: Yes, sir. I believe, according to our schedule, those two are the two top pictures.

Mr. Johnston: Isn't it your memory, Mr. Corinblit, as long as we are stipulating, that *Cyrano* had played at the Fine Arts Theatre on Wilshire Boulevard on a first run basis prior to its exhibition at the Loyola Theatre?

Mr. Corinblit: I don't have any recollection on that subject. I think we can check it, however, by [2158] examining the play-off we put in evidence.

Mr. Johnston: Well, we can leave that in abeyance, perhaps.

Mr. Corinblit: All right.

Mr. Johnston: So with those two exceptions, then, I take it the stipulation is that Fox product was played exclusively on the top half of the bill for the period I inquired about.

Mr. Corinblit: Subject to only one matter. I don't think it is too important. Subject only to the question as to whether any of these features that are listed here below first feature are top features. I don't believe they are.

Mr. Johnston: We will go into that and maybe we can get some testimony on that.

Mr. Corinblit: I will stipulate subject to that possible exception.

Mr. Johnston: Now, that is the Republic picture—what was the name of that? Captain Fabian?

Mr. Corinblit: Fighting Coast Guard.

(Testimony of Sidney Lehman.)

Mr. Johnston: Fighting Coast Guard, you are right, and Cyrano De Bergerac, a United Artists picture.

Q. (By Mr. Johnston): Do you recall the picture produced and distributed by Allied Artists called Short Grass? A. Yes, I do.

Q. Do you recall that that played on the second [2159] half of the bill at the Loyola in January of 1951?

Mr. Corinblit: We will stipulate to that, counsel. It is in the exhibit.

Mr. Johnston: All right. Thank you.

Q. Do you recall making any attempt to license that picture, the Allied Artists picture, Short Grass, for first run exhibit at the Paradise Theatre?

A. No.

Q. Do you recall the Monogram picture Bowery Battalion, which played at the Loyola Theatre on the second half of the double bill during February 1951?

Mr. Corinblit: Counsel, I have got to interrupt you here.

Mr. Johnston: Surely.

Mr. Corinblit: Does your record show Bowery Battalion played with another picture?

Mr. Johnston: It apparently played with Call Me Mister, as nearly as I recall, a Fox picture.

Mr. Corinblit: My schedule shows Call Me Mister February 9 to 15 and Bowery Battalion the 16th to the 20th. Is that an error in the schedule?

(Testimony of Sidney Lehman.)

Mr. Johnston: I think it is, according to my schedule.

Mr. Corinblit: All right.

Mr. Johnston: But apart from that, according [2160] to my schedule, they played at the same time, Mr. Corinblit. It played with the picture *Call Me Mister* from February 9 through February 20th.

Mr. Corinblit: All right. I will take that subject to correction.

Now, with respect to the question of whether or not there was an attempt to obtain *Bowery Battalion*, a *Monogram* picture, I would object to that as being outside the scope of this case. It is not a picture of one of the eight majors, not one of the defendants. There is no materiality.

The Court: You have had evidence of companies that were not parties defendant.

Mr. Corinblit: Yes, sir.

The Court: They objected to that and I overruled the objection.

The Court: But that has to do with the eight major companies, not with respect to minor companies.

The Court: Objection overruled. [2161]

Q. You recall the picture *Bowery Battalion* playing at the Loyola Theatre on the second half of the bill in February 1951?

A. I don't recall it, but if it played there that is it.

Q. You do recall the picture? A. Yes.

(Testimony of Sidney Lehman.)

Q. You made no attempt to license that picture for the Paradise Theatre first run, did you?

A. Well, I couldn't very well have——

Q. Just a minute. I simply asked you for the moment if you made any attempt to license a picture for first run exhibition in the Paradise Theatre.

A. No.

Q. Do you remember the Eagle-Lion picture Naughty Arlette which played at the Loyola Theatre as the second half of the double bill in February of 1951?

A. I remember the picture. I don't recall that it played the theatre.

Q. Do you recall making any attempt to license that picture for first run exhibition at the Paradise Theatre?

A. I couldn't have bought it if I wanted to.

Q. If you will answer my question I think we can conclude this case before Labor Day, maybe. I think the question can be answered yes or no. [2162]

A. No.

Q. Do you recall the Lippert production Fingerprints Don't Lie? A. I recall the production.

Q. Do you recall its having played at the Loyola Theatre also in February 1951 as a second half of a double bill? A. I don't recall.

Q. Do you recall making any attempt to license that picture for first run exhibition at the Paradise Theatre? A. No.

Q. Do you recall the Republic picture Cuban

(Testimony of Sidney Lehman.)

Fireball which played as the second half of a double bill at the Loyola Theatre in March 1951?

A. I recall the picture.

Q. Do you recall making any attempt to license that picture for first run exhibition at the Paradise Theatre? A. No.

Q. Do you recall the United Artists picture Mister Universe? A. I recall the picture.

Q. Do you recall that that played at the Loyola Theatre on the second half of a double bill in April of 1951?

A. I don't recall that it played.

Q. Did you make any attempt to license Mister Universe [2163] for first run exhibition at the Paradise Theatre? A. No.

Q. Do you recall the United Artists picture My Outlaw Brother which played at the Loyola as a second half of a double bill in April of 1951?

Mr. Corinblit: Pardon me, Mr. Johnston. May I interrupt you? Is it your information that that is a United Artists picture or Eagle-Lion picture?

Mr. Johnston: Is there much difference?

Mr. Corinblit: The schedule stipulated to shows it is an Eagle-Lion picture.

Mr. Johnston: If that is right, I will certainly accept that. My record shows it is a United Artists picture. My record could be wrong.

Q. If it is Eagle-Lion that doesn't alter your answer, does it? A. No.

Q. Whether it was Eagle-Lion or United Artists you didn't try to get it in the Paradise first

(Testimony of Sidney Lehman.)

run, did you? A. No.

Q. All right. Now, did you testify you did not try to get My Outlaw Brother for first run at the Paradise?

A. Yes, I testified that I did not.

The Court: Will you keep your voice up, please?

The Witness: Yes, sir. [2164]

Q. (By Mr. Johnston): Well, you may not remember or do you remember if that played as a second half of a double bill at the Loyola in April 1951? A. No, I don't remember.

Q. Do you recall the United Artists picture When I Grow Up which played as a second half of a double bill at the Loyola Theatre in May of 1950?

A. I recall the picture, but I don't know if it played or not.

Q. Do you recall making an effort to get that picture for first run exhibition at the Paradise Theatre? A. No.

Q. Do you recall the United Artists picture The Long Dark Hall which played at the Loyola Theatre as a second half of a double bill?

A. I remember the picture.

Q. Do you recall having made an attempt to get that picture for first run exhibition at the Paradise Theatre? A. No.

Q. Do you recall the United Artists picture—pardon me. Do you recall the Republic picture Million Dollar Pursuit that played at the Loyola Theatre?

(Testimony of Sidney Lehman.)

A. I recall the picture, but I don't know that it played at the Loyola.

Q. You didn't try to get that picture first run for the Paradise? [2165] A. No.

Q. Do you recall the United Artists picture which played as the second half of a double bill at the Loyola, Circle of Danger?

A. I remember the picture.

Q. You didn't try to get that either for first run exhibition at the Paradise Theatre, did you?

A. No.

Q. Now, to shorten this I am going to read off a number of pictures down through September of 1951. And before I do, counsel, have I, according to your record there, asked Mr. Lehman about all of the second features that played the Loyola during the period in question?

Mr. Corinblit: Other than Fox—where they were a double feature with Fox?

Mr. Johnston: Yes. I am talking about the other pictures. Have I omitted any so far?

Mr. Corinblit: Not according to the record in evidence.

Mr. Johnston: Will you check me as I read off the group, and if there are any omissions will you be good enough to advise me of them?

Mr. Corinblit: Yes.

Mr. Johnston: Now, I am going to ask you as to all of these pictures which, according to my record [2166] here, played the second half of a double bill at the Loyola Theatre through September of 1951,

(Testimony of Sidney Lehman.)

and ask you with respect to all or any of them whether you attempt to license them for first run exhibition at the Paradise Theatre.

First I will ask you about the Republic picture Secret of Monte Carlo.

The Witness: No.

Q. (By Mr. Johnston): RKO picture Tarzan's Peril. A. No.

Q. Monogram picture According to Mr. Hoyle.

A. No.

Q. The Monogram picture Casa Manana.

A. No.

Q. The Republic picture Fugitive Lady.

A. No.

Q. The Monogram picture Let Us Go Native.

A. No.

Q. The Republic picture This Is Korea.

A. No.

Q. The United Artists picture Queen for a Day.

A. No.

Q. The Republic picture Sea Hornet.

Mr. Corinblit: You are beyond the period now, counsel.

Mr. Johnston: Oh, I beg your pardon. Does that include all that are on your list, the ones I just read?

Mr. Corinblit: Yes, it does.

* * * * *

Redirect Examination

Q. (By Mr. Corinblit): Mr. Lehman, Mr. Mitchell and Mr. Johnston asked you some questions

(Testimony of Sidney Lehman.)

about the memoranda of conversations which you had. I think you testified as to a conversation with Mr. Fred Greenberg, that you had a memorandum about, is that correct? A. Yes.

Q. Is Mr. Greenberg alive? A. Yes.

Q. Who does he work for?

A. Warner Bros. Pictures.

Q. Now? A. Yes, sir.

Q. In Los Angeles? A. Yes, sir.

Q. With respect to Mr. Taylor, you had a memorandum of your conversation with Mr. Taylor. Is Mr. Taylor alive? [2169] A. Yes, sir.

Q. Where does he work?

A. Paramount Pictures.

Q. In Los Angeles? A. Yes, sir.

Q. Today, now? A. Yes, sir.

Q. With respect to Twentieth Century-Fox, you testified as to a conversation with Mr. Eckhardt, is that right? A. Yes.

Q. Mr. Eckhardt is not employed by Twentieth Century-Fox any more, is he, do you know?

A. Well, he is on pension. Whether that is called employable or not, I don't know.

Q. But he is in Los Angeles? A. Yes, sir.

Q. Lives here? A. Yes, sir.

Q. With respect to Metro - Goldwyn - Mayer, I think you testified you talked to Mr. Aspell, is that correct? A. Yes, sir.

Q. He works for Metro-Goldwyn-Mayer right now? A. Yes, sir.

Q. Here in Los Angeles?

(Testimony of Sidney Lehman.)

A. Yes, sir. [2170]

Q. With respect to RKO, you testified as to a conversation with Mr. Cohen, is that correct?

A. Yes, sir.

Q. Mr. Cohen is deceased? A. Yes, sir.

Q. With respect to Columbia, you testified to a conversation with Mr. Wayne Ball?

A. Yes, sir.

Q. Is he alive? A. Yes, sir.

Q. Works for Columbia? A. Yes, sir.

Q. In Los Angeles? A. Yes, sir.

Q. You testified about a conversation with Mr. Evidon? A. Yes, sir.

Q. Does he work for Columbia now?

A. No.

Q. Is he in Los Angeles, do you know?

A. Yes.

Q. In regard to United Artists, I think you testified to a conversation with Mr. Carnegie—no. I am not sure of that. A. Bert Pollard.

Q. Bert Pollard. Is he alive? [2171]

A. Yes.

Q. Works for United Artists? A. Yes.

Q. In Los Angeles? A. Yes.

Q. You testified to a conversation with a Mr. Frank Prince. A. Yes.

Q. Is Mr. Prince alive? A. Yes.

Q. Does he work for Fox now? A. Yes.

Q. Here in Los Angeles? A. Yes.

Q. I don't remember whether you testified to a

(Testimony of Sidney Lehman.)

conversation with Mr. Bert Pirosh but, of course, he has already been on the stand.

Mr. Johnston: And still alive.

Mr. Corinblit: Still alive.

Q. Now, Mr. Lehman, Mr. Mitchell asked you a little bit about the picture Santa Fe. Santa Fe was a Columbia picture, is that correct?

A. Yes.

Q. With regard to the pictures of the major companies during the period August 23 to September 18, 1951, Paradise [2172] didn't play any pictures day and date with the Academy, is that right?

A. No, sir.

Q. That is, they did not play? A. No.

Q. With respect to the 7 day availability and the theatre the Fifth Avenue, at any time did the Paradise ever play day and date on the 7 day availability with the Fifth Avenue Theatre?

A. Well, no. We never played day and date because they pulled Santa Fe.

Q. They pulled Santa Fe. What was the reason given?

A. Because we were playing the picture day and date with them.

Q. Let's get this clear. During the period when you took over, December up through Born Yesterday—well, you testified as to the conversations you initially had with the distributors when you requested first run, and if not first run, 7 days, and so forth? A. Yes.

(Testimony of Sidney Lehman.)

Mr. Mitchell: I object to that as being argumentative and leading.

Mr. Corinblit: All right.

The Court: Sustained.

Q. (By Mr. Corinblit): Now, Mr. Johnston also [2173] asked you some questions about the pictures that played the second feature at the Loyola.

A. Yes.

Q. Turning first to the picture—I think there was one picture from RKO, a picture called Tarzan's Peril. You testified to a conversation with Mr. Cohen about first run? A. Yes.

Q. In December 1950? A. Yes.

Q. And did anyone from RKO call you up and offer you Tarzan's Peril? A. No.

Q. With respect to United Artists pictures, the one or two, the few that played first run at the Loyola, you testified you talked to the United Artists people when you first took over? A. Yes.

Q. Did any representative of United Artists discuss with you playing those pictures first run in the Paradise? A. No.

Q. Turning to the pictures other than United Artists, other than RKO, when you play a theatre, you try to operate a theatre on a first run basis, what do you need as far as double bill is concerned, what kind of pictures do you need at the top half and what kind at the bottom half? [2174]

A. You need an A, double A or triple A picture as a top picture, and you need a B minus, C

(Testimony of Sidney Lehman.)

or C minus as your second feature or filler, or whatever you might want to call it. [2175]

Q. Who makes the supply of the top half features in the motion picture business—who did in 1950 and '51, what companies?

A. Well, all the major companies.

Q. Do you want to name them?

A. If you wish me to. There was Metro, Fox, Paramount, Warner's, RKO—quite a number—quite a number from Universal, a fair amount from Columbia, and a fair amount from United Artists.

Q. All right. Now, those companies are known as the majors, is that right? A. Yes, sir.

Q. Now, did these companies, any one of these companies during the period from the date you took over operating the Paradise or buying and booking for the Paradise through September 1951, ever solicit you to license any of their pictures on first run? A. No.

Q. But you had had discussions with them in which you had asked them for first run when you took over from Mr. Schreiber in 1950?

A. Yes, sir.

Mr. Johnston: I object to that as leading and argumentative.

The Court: Well, I think you are trying to argue the case. [2176]

Mr. Corinblit: I am trying to rebut the inferences suggested by some of the questions Mr. Johnston asked.

The Court: Well, I think it is leading.

Mr. Corinblit: I will withdraw the question.

(Testimony of Sidney Lehman.)

The Court: The objection is sustained.

Q. (By Mr. Corinblit): Now, if you don't have a supply of top features when you want to operate a theatre on a first-run policy, would the pictures that Mr. Johnston named off, coming from the non-majors—that is Monogram and from the other companies, the nonmajors, could they be used as the bottom half of a double bill and operate a theatre properly?

Mr. Johnston: Object to that as leading and suggesting the answer.

Mr. Corinblit: Your Honor——

The Court: Overruled.

Q. (By Mr. Corinblit): Go ahead.

A. No, you couldn't use them.

Mr. Corinblit: No further questions.

Mr. Mitchell: Nothing further.

The Court: You may step down.

(Witness excused.)

Mr. Corinblit: The plaintiff will recall for just a few questions Mr. John Bertero as a hostile and adverse witness. [2177]

JOHN B. BERTERO

recalled as a witness on behalf of the plaintiff, under the provisions of Rule 43(b) of the Federal Rules of Civil Procedure, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

Q. (By Mr. Corinblit): Mr. Bertero, calling your attention to the product of Universal, which

(Testimony of John B. Bertero.)

has been testified here was played in a group of Fox theatres day and date with the United Artists Theatre downtown for some five years beginning in 1946, did you have a conversation with Mr. Skouras in which Mr. Skouras referred to conversations that had been had between Mr. Blumberg, the president of Universal, and the people connected with the RKO Theatres about the arrangement leading to the Universal pictures going to Fox?

A. I remember a rather hazy—I remember rather hazily a conversation of many years ago. It was very short. Mr. Skouras told me he had had a conversation with Mr. Nate Blumberg of Universal Pictures.

Q. And what did Mr. Skouras tell you that Mr. Blumberg had told him?

A. Well, I am going back quite a distance. That must have been about 1945 or 1946. Perhaps earlier than that. [2178] I think the war was on or we were just at the end of the war and it is my recollection that Mr. Skouras had just returned from a meeting with Mr. Blumberg and he said that, as I recall, that the RKO-Pantages Theatre was backlogged with a lot of pictures.

Normally they were playing the RKO pictures concurrently with the Universal product.

Q. And Columbia product?

A. That I don't recall, but in any event the pictures were lasting so long—times were different then and a picture that would last, say, a week or two weeks today was lasting five, six, or eight weeks

(Testimony of John B. Bertero.)

then, and it is my recollection that the Universal pictures were being delayed on release and that Mr. Blumberg had told Mr. Skouras that he was looking for other first-run arrangements in Los Angeles.

It is just a rather hazy recollection of a conversation years ago.

Q. Did Mr. Skouras tell you that Mr. Blumberg had told him that he, Mr. Blumberg, had had a conversation with Mr. Rodney Pantages—let me stop there.

Who was Mr. Rodney Pantages in 1946?

A. He was the operator of the RKO-Pantages Theatre on Hollywood Boulevard.

Q. And those two theatres were operated jointly, the Pantages Theatre Downtown and the Pantages [2179] Theatre on Hollywood Boulevard? I mean the RKO Hill Street Theatre downtown and the Pantages Theatre on Hollywood Boulevard were operated jointly at that time, is that correct?

A. I don't know their arrangement, but normally they played the pictures day and date.

Q. Now, what did Mr. Skouras tell you that Mr. Blumberg related to him concerning his conversation with Mr. Pantages?

Mr. Mitchell: I object to that on the ground it assumes a fact not in evidence, that there ever was a conversation with Pantages or that there ever was a conversation between Skouras and Mr. Blumberg about Pantages.

Mr. Johnston: I think there is a more basic ob-

(Testimony of John B. Bertero.)

jection than that. This calls for several degrees of hearsay.

The Court: I was just wondering about the hearsay rule. Ordinarily you can't introduce hearsay testimony, but you can ask the witness about conversations that are purely hearsay.

Mr. Corinblit: Yes.

The Court: At least that is what you are doing, but I don't know if you are doing it properly.

Mr. Corinblit: This is a conversation—let me say this: This is a conversation between the president of one of the defendant corporations, Mr. Charles Skouras, and Mr. John Bertero. This is a conversation in which Mr. Skouras stated to Mr. Bertero what he was told by the president of [2180] another defendant company in this case, Mr. Blumberg. Mr. Blumberg was president of Universal. Now there is——

Mr. Johnston: What he was told—you haven't completed the story, what he was told by somebody else who isn't a party to this proceeding at all. That is the vice of the question. [2181]

Mr. Corinblit: No, your Honor. We can get the matter straightened out. The question here is Mr. Bertero had a conversation with Mr. Skouras about this matter of first run Universal pictures. Mr. Skouras told Mr. Bertero what Mr. Blumberg, the president of Universal had told him about the arrangement leading to the Universal transferring the Universal product to Fox.

There is no hearsay problem here because you

(Testimony of John B. Bertero.)

have got the officers of Fox—here is an officer of Fox on the stand who is testifying about it and testifying about a conversation with the president of his own company.

You have the man here——

The Court: Well, I suppose he can testify as to what the conversation was.

Mr. Corinblit: Yes.

The Court: But suppose the man who is conversing then says, “So and so told me that he got it from so and so.” That is purely hearsay.

Mr. Corinblit: But that hearsay rule does not apply in a situation like this, where you have the representative of the defendant on the stand.

Mr. Johnston: I don’t care whether he is the president or the janitor, Mr. Corinblit. It doesn’t make any difference. He can’t—excuse me, your Honor. I should be addressing the court. [2182]

In my opinion, your Honor, Mr. Bertero nor anyone else can say that Mr. so and so told him that and that Mr. so and so told him that and Mr. so and so said this.

Now, if we get into that, we might as well throw the hearsay rule out the window. It is pure hearsay of the rankest sort.

Mr. Corinblit: Your Honor, especially in the light of the testimony in this case and the records that have gone into it, the arrangement that Mr. Bertero testified to was that Mr. Skouras was telling—suppose Mr. Skouras was here on the stand and you were asking Mr. Skouras:

(Testimony of John B. Bertero.)

"How was it that Fox got Universal product," and he said, "I got it from Mr. Blumberg. Mr. Blumberg prior to that had discussed the matter with so and so and had agreed to transfer the product to Fox." It is as simple as that.

The Court: When Mr. Bertero was on the stand the other day, did you go into this question?

Mr. Corinblit: No. That was one of the questions Mr. Bertero stated—Mr. Bertero stated he had to leave and he couldn't go over until the next day and it was agreed he was to come back for two or three questions. This is one of them. It is very brief and there are only one or two others.

The Court: I suppose you have a right to ask the witness what the conversation was.

If you can remember the conversation, you may state it. [2183] If you can't remember, then, of course, you can't testify as to it.

The Witness: It was a high-light of some years ago. It wasn't a conference between Mr. Skouras and myself. He just came into the office and he asked me to come in with him to take some other matter, and just as a passing remark he told me about the Universal situation.

As I remember it, pictures were lasting so long over at the RKO-Pantages Theatre that Universal was apparently dissatisfied and wanted to get its pictures played off faster, which meant they went on the market, which is always a delight to an exhibitor.

(Testimony of John B. Bertero.)

The Court: Is that all you can remember of the conversation?

The Witness: I only remember the high-lights. It was a passing remark of Mr. Skouras. That was all.

Q. (By Mr. Corinblit): Now, Mr. Bertero, isn't it a fact that Mr. Skouras told you that in a conversation with Mr. Blumberg, the president of the Universal Film Company, Mr. Blumberg had talked to a representative of the RKO—let me get the exact language,—talked to RKO about transferring the product to Fox and the RKO representative was agreeable to transferring the products to Fox. Isn't that what Mr. Skouras told you?

Mr. Johnston: I am going to object again on the [2184] ground that this calls for hearsay upon hearsay.

The Court: Overruled.

The Witness: I can't remember that at all. I have no recollection that that ever occurred.

Mr. Corinblit: I will show you—

The Witness: Will you repeat your question?

Mr. Corinblit: Will you read the question, Mr. Reporter.

(Question read.)

The Witness: You are talking about Rodney Pantages?

Q. (By Mr. Corinblit): Yes.

A. When you say RKO?

Q. Yes.

A. He wasn't RKO. He was the owner and oper-

(Testimony of John B. Bertero.)

ator of the Pantages Theatre. In fact, he and his father built it, and then some time in the middle 30's he made arrangements with RKO either to sell them a half interest or something. Anyway they jointly operated it and obviously he was the theatre operator and he apparently had a sufficiency of product and it was agreeable with him, with Mr. Blumberg, apparently, too, for Universal to sell those pictures away.

Normally, a customer would holler if they lost their pictures but Rodney Pantages obviously was satisfied if he couldn't play them. But I don't remember the conversation, Mr. Corinblit. I don't pretend to. [2185]

Q. Well, Mr. Bertero, you testified to the fact, so I don't need the conversation.

A. You said RKO representative, and Rodney Pantages would have been the only one.

Q. And Mr. Rodney Pantages, as you testified, some time in the thirties entered into an arrangement with Fox——

A. As I said, I didn't know those arrangements, but it became publicly known he and RKO had formed some sort of an arrangement.

Mr. Johnston: He didn't enter into an arrangement with Fox.

Mr. Corinblit: Correct. With RKO. All right.

Q. Now, Mr. Bertero, calling your attention to the termination of the interest of United Artists Theatre Circuit in United Artists West Coast Theatres Corporation, I want to establish, if I can, the

(Testimony of John B. Bertero.)

dates of certain meetings between Fox, between Mr. Joseph Schenck of UA Theatre Circuit, as well as Twentieth Century-Fox, and Mr. Skouras and yourself. I would ask you to state whether or not there was a meeting between Mr. Skouras and Mr. Schenck——

Mr. Mitchell: Which Mr. Skouras?

Q. (By Mr. Corinblit): Mr. Charles Skouras and Mr. Joseph Schenck on or about the week of April 27, 1949.

A. There was a meeting, I think that's the second meeting we had in Florida. [2186]

Q. That was in Florida?

A. Yes. That was the United Artists team, and Mr. Skouras, Charles Skouras, Mr. Coxe and myself attended on behalf of Fox West Coast Theatres Corporation.

Q. You say that was a second meeting in Florida at that time?

A. I think that was in April 1949.

Q. Pinning it down, would you say there were meetings in the week of April 27, 1949?

A. Mr. Schenck customarily went for a winter vacation in Florida, and this was a very important subject for discussion between the two companies, because of the values of the properties involved, and he and his attorneys, and I believe their treasurer of United Artists Theatre Circuit, were in Florida, and he asked Mr. Skouras if he would come to Florida to discuss this subject. So Mr. Skouras, myself, and Mr. Coxe, our treasurer, went

(Testimony of John B. Bertero.)

to Florida, and I think we were there probably—I don't remember, a week or three or four days.

Q. You were there during the week of the 29th?

A. Well, I would have to somehow or other verify that. I don't know. It was in April, I remember.

Mr. Corinblit: Let me mark this first. We will mark as plaintiff's exhibit next in order letter agreement between Fox West Coast Theatres Corporation, [2187] signed by Charles P. Skouras, and United Artists Theatres of California, Ltd., by Joseph M. Schenck, president, dated April 27, 1949.

The Clerk: 66 for identification.

(The exhibit referred to was marked as Plaintiff's Exhibit No. 66 for identification.)

Mr. Mitchell: Is this going to be offered?

Mr. Corinblit: First to refresh recollection, and then there will be portions of it offered.

Mr. Mitchell: In compliance with the court's order?

Mr. Corinblit: Yes.

Q. I will show you Plaintiff's Exhibit 66 for identification, Mr. Bertero, and ask you to examine it. Are you familiar with that document, by the way?

A. Not any more.

Q. All right. Is this the signature of Mr. Charles P. Skouras and the signature of Mr. Joseph Schenck?

A. It is.

Q. All right. I ask you, Mr. Bertero, does this refresh your recollection that the time of the meetings, one of the meetings in Florida between Mr.

(Testimony of John B. Bertero.)

Schenck and Mr. Skouras and yourself was in the week of April 27, 1949?

A. Well, we were in Florida. This document was signed while I was there. In fact, I attended to its execution. It is dated April 27th and I have every reason to believe it is dated on the date we were there. I think we were there three or [2188] four days or a week. I don't remember how long we were there.

Mr. Corinblit: Your Honor, we will offer in evidence Exhibit 66, and I think your Honor should examine it to determine what portions of the exhibit you desire to admit.

Mr. Johnston: Your Honor, this is similar in nature to some other exhibits that have been introduced with qualifications. I suggest the same qualifications should be applied here. Perhaps Mr. Corinblit could indicate the portion to be offered subject to the prior ruling. Would you do that, Mr. Corinblit?

Mr. Corinblit: All right. As soon as the court is through.

The Court: I am going to sustain the objection to the document in toto.

Q. (By Mr. Corinblit): As a result of the agreement reached between your company and United Artists Theatre Circuit at this meeting in 1949, certain theatres went to United Artists Theatre Circuit and certain theatres went to Fox, is that correct, Mr. Bertero?

A. I testified before that this was the reorgani-

(Testimony of John B. Bertero.)

zation of United West Coast, an important company, and the problem involved was who got what theatres. One of our objectives was to acquire the Chinese Theatre, and I think it is as an outgrowth of those discussions that they agreed to sell us the [2189] Chinese Theatre and we agreed to trade them three other theatres for the Chinese. I have forgotten the particular details. But that is the first memorandum of the understanding.

Q. All right.

A. It was ultimately embodied in voluminous legal agreements.

Mr. Corinblit: We will next mark for identification—I want to just mark this for identification now.

The Court: It may be marked for identification only.

Mr. Corinblit: An agreement between Fox West Coast Theatres Corporation, United Theatres Corporation of California, Ltd., United West Coast Theatres Corporation, and Fox West Coast Agency.

The Clerk: 67 for identification.

(The exhibit referred to was marked as Plaintiff's Exhibit No. 67 for identification.)

Q. (By Mr. Corinblit): I will show you Plaintiff's Exhibit 67 for identification and just ask you, Mr. Bertero, whether this was the final agreement between the companies indicated relating to the termination of interests that you have described?

A. Affecting what theatres? There was more than one agreement.

(Testimony of John B. Bertero.)

Q. I see. Is this one of the agreements which [2190] related to that subject?

A. Yes. We signed up that arrangement——

Mr. Mitchell: Can't hear you, Mr. Bertero.

The Witness: We signed up the final documents, as I recall, most of them in December 1949. There were one or two other documents signed a little earlier, but there was a great mass of documentary work involved in concluding our arrangements. This is an unconformed agreement, and I don't know if this is the final, but if our counsel has supplied it to you, then this is one of the agreements. I am sure he has. It is our agreement.

Mr. Corinblit: Yes. I received this from him or I have a copy which is a duplicate of this. Is that right, Mr. Johnston?

Mr. Johnston: I am sure you did, yes.

Mr. Corinblit: I have no further questions at this time.

Mr. Johnston: We have no questions, your Honor.

The Court: You may step down.

The Witness: Thank you.

(Witness excused.)

Mr. Corinblit: The plaintiff will call Mr. Max Schreiber. [2191]

MAX S. SCHREIBER

called as a witness by and on behalf of the plaintiff herein, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name?

The Witness: Max S. Schreiber.

Direct Examination

Q. (By Mr. Corinblit): Mr. Schreiber, are you the son of Mr. Alex Schreiber? A. Yes.

Q. Have you been an officer of the plaintiff corporation, Paradise Theatre Building Corporation?

A. I have.

Q. What office have you held in that company?

A. Vice president.

Q. Calling your attention to the year 1949, did you have a conversation with Mr. Edward F. Zabel of Fox West Coast and others pertaining to the Paradise Theatre? A. I did. [2192]

Q. And where did the conversation take place?

A. At the Beverly-Wilshire Hotel.

Q. Beverly-Wilshire Hotel? A. Yes.

Q. And can you tell us when that conversation took place?

A. Prior to the opening of the theatre.

Q. Did the conversation take place in 1949 or 1950? A. It was in 1950, June or July.

Q. All right. Was there someone who asked you to come to a meeting at the Beverly-Wilshire Hotel?

A. I was asked to come by Mr. William Toplikar.

Q. And will you state who were present at the meeting at the Beverly-Wilshire Hotel?

(Testimony of Max S. Schreiber.)

A. Mr. Phil Isley, Mr. Earl Collins. He was from Republic Pictures, and Mr. Eddie Granger, who was a producer of pictures. I believe he was at RKO.

There was Mr. Zabel, Mr. Toplikar who was a real estate broker, and perhaps a Mr. James Haynes who was associated with Mr. Isley in the Picwood Theatre.

Q. Was Mr. Isley there at the meeting?

A. Mr. Isley was there at the meeting.

Q. Now, will you state what you said at the meeting and what the other persons present at the meeting said?

A. Mr. Collins and Mr. Granger and Mr. [2193] Toplikar had been to the theatre to see my dad and myself on several occasions prior to that meeting in regard to purchasing the Paradise Theatre.

We had had some preliminary negotiations with them and Mr. Toplikar called me to come to the Beverly-Wilshire Hotel that night. It was about 9:30 or 10:00 o'clock that night. I guess he called me at dinner to meet them there at 9:30 or 10:00 o'clock at night. He told me that they had a firm proposition to make.

I went to the meeting, of course, and we talked in general about the theatre business and the Picwood Theatre which they had, and I was introduced to the gentleman there that I didn't know, which was at that time Mr. Isley. I hadn't met him before.

Mr. Zabel was introduced—I was introduced to

(Testimony of Max S. Schreiber.)

Mr. Zabel and we talked about the Picwood Theatre which Mr. Isley owned. And we talked about the La Tijera Theatre which was open and which Mr. Isley had.

We talked about the Imperial Theatre and we talked about Mr. Isley's theatres in Texas.

Mr. Zabel talked some about the Fox theatres and the picture situation.

Then they made an offer and Mr. Isley told me that they were willing to pay \$550,000 for the theatre as it was. It was completed. The theatre was completed but it was not open. [2194] We didn't have any pictures. It wasn't open. We were closed but the theatre was all completed ready to open. It could have opened the next day and he said:

"We don't need any lawyers or anything." He says, "I will just write it out here on the stationery, if you want. That is the way we do things in Texas."

And I said, "Well, I don't know. What does the \$550,000 consist of? How do you want to pay it? Is that \$550,000 cash or do you want to pay off the mortgage, too? We have the equipment. Do you want to take over the contracts for the equipment?"

He said, "Well, let us figure it out and see what it is." There was \$175,000 mortgage which they were going to assume, and there was \$60,000 or \$70,000 in equipment payments they were going to assume, and they were going to give us \$150,000 cash and the balance of the money over a three or four-year period.

I said to them, "Well, I still have about \$125,000

(Testimony of Max S. Schreiber.)

or \$150,000 coming and how would we know that we would get our money if we turned it over to you because we can't get any pictures to open the theatre. If we had pictures we would open the theatre ourselves," and Mr. Zabel said, "We will not have any trouble getting pictures. We will take the theatre and get pictures. That is why we are taking the theatre. We will put the pictures in the theatre. You have [2195] nothing to worry about and you will get your money."

So Mr. Collins said, "We don't have any trouble getting pictures at the Picwood," and I said we had had trouble. He said he had a little trouble to begin with, but "We have pictures now and will get pictures for the Paradise Theatre, but you can't get any pictures. We will get all the pictures."

So, that went on until about 1:30 in the morning, and I told them I would talk it over again with my dad the next day when I saw him and we would let them know.

That was a week day night, a Wednesday or Thursday, and that was the only meeting I had with the gentlemen.

I told my dad about it the next day and we discussed it for two or three days, and I believe they came over.

Q. All right. A. Is that enough?

Q. Yes. Mr. Schreiber, you have related the conversation as best you recall that took place at the Beverly-Wilshire, is that correct? A. Yes.

(Testimony of Max S. Schreiber.)

Q. And that was the only conversation you were present at with Mr. Zabel, is that correct?

A. Yes.

Q. Now, prior to this meeting with Mr. Zabel and the other persons that you mentioned at the Beverly-Wilshire Hotel, in about 1949, were you present at a meeting at which your [2196] father was present and Mr. Joseph Schenck and Mr. Irving Epstein and Mr. Pat Di Cicco were present in the office of Mr. Schenck at the Twentieth Century-Fox Studios? A. I was.

Q. Now, do you remember the approximate date of that conversation?

A. I believe it was March 15th or 16th, 1949.

Q. Now, will you tell us what was said—tell us your recollection of what was said at that meeting by you and the other parties present?

A. Well, I went there with my dad to the meeting and we went with Mr. Irving Epstein or he met us there at the office, at the receptionist's desk and we went into Mr. Schenck's office and Mr. Di Cicco was there.

I didn't say anything at the meeting that I can recall of any particular interest or importance.

I was introduced to Mr. Schenck and Mr. Di Cicco, and Mr. Epstein I had met. And the discussion was in regards to Mr. Schenck purchasing an interest in the Paradise Theatre with us. [2197]

It was to be a 60 per cent interest for Mr. Schenck's group, and we were there—sometime during the morning I recall Mr. Schenck showing us the

(Testimony of Max S. Schreiber.)

figures of the Loyola Theatre with the first run Fox pictures. He told my father that he had had a first run Metro in there day and date with the Egyptian and Loew's State downtown, and that it would be a very successful theatre. And based on the business that the Loyola was doing first run that with Metro pictures they certainly could do as well as the Fox pictures right down the street on the first-run basis, and it would be better for us if we had 40 per cent interest with his group than 100 per cent interest by ourselves, because we wouldn't have any pictures; and that we should be with them and then we wouldn't have to worry about anything.

My dad was going to Honolulu the next day or the day after that and Mr. Schenck told my dad to go on to Honolulu and that they would sign the papers as soon as my dad came back and that he didn't have to worry about anything; that the United Artist was going to take over the booking and buying for the theatre, and they were going to charge five per cent or five and a quarter per cent and all our worries about pictures would be over because they had all the pictures—they could do whatever they wanted.

Q. Was anything said about the plans of the theatre?

A. Yes. We had a full set of plans of the theatre [2198] and we had I believe our mortgage commitment which we showed them—how much the mortgage was that we were going to get and we were ready to start building the theatre.

(Testimony of Max S. Schreiber.)

Q. Now, that was in March of 1949, correct?

A. Yes.

Q. Calling your attention now to the year 1950, approximately March or April 1950, were you present at a group of conversations between your father and representatives of the distributors?

A. I was.

Q. Just referring to the company Universal, Mr. Schreiber, did you have a conversation with anyone at Universal?

A. With Mr. Marriott and my father.

Q. Do you remember approximately when that took place?

A. I believe in April of 1950 or March, the latter part of March or the first week in April.

Q. And was anyone else present besides yourself and Mr. Marriott and your father?

A. Just the three of us, to my recollection.

Q. And what was said at that meeting by yourself or your father or Mr. Marriott?

A. My dad asked Mr. Marriott to serve us—we wanted to open our theatre. We were almost completed. We would be in another few weeks. He wanted them to serve us first-run [2199] pictures along with the five theatres they had around the town. We wanted to be added to that group and play first run Universal pictures day and date with the other five theatres.

Mr. Marriott said he couldn't make that decision; that Mr. Rose had to make the decision, Barney Rose or Mr. Blake, who was going to take over, or

(Testimony of Max S. Schreiber.)

was going to be the new manager; that the decision wasn't up to him, but he would take it up with Mr. Rose and he would take up the seven-day availability also.

And he told us we had a—he had been by the theatre during construction and it looked like it was going to be a very fine theatre. It was in a very fine neighborhood and he said that we should have a successful theatre there. [2200]

* * * * *

Mr. Corinblit: With respect to Mr. Max Schreiber, your Honor, we have no further questions.

MAX S. SCHREIBER

heretofore sworn, resumed the stand and testified further as follows:

Mr. Mitchell: No questions.

Mr. Johnston: I have a few questions.

Cross Examination

Q. (By Mr. Johnston): Mr. Schreiber, yesterday you mentioned a conversation you had at the Beverly-Wilshire Hotel. A. Yes, sir.

Q. It is true, is it not, that some time after that meeting that you have testified about, you and your father or your corporation decided not to accept the proposal that was made and to go ahead with Marco Wolff? A. That is right.

Q. At this meeting that you have described at the Beverly-Wilshire Hotel or at any time, did you learn that Mr. Zabel was acting for his daughter?

(Testimony of Max S. Schreiber.)

A. No.

Q. That never came to your attention?

A. No.

Q. Now, you also described a meeting that you had had with Mr. Schenck and others at which your father was present in 1949. [2205]

Now, with respect to that incident, Mr. Schreiber, didn't you know that if a deal could be consummated, that United Artists Theatres Circuit was to be the purchaser or part purchaser of the theatre or theatre site?

A. I knew that United Artists Theatres was to be a part purchaser and I knew they were going to do the booking and buying. That was told to me by Mr. Schenck.

Q. You knew that United Artists Theatres Circuit was to be the purchaser if the deal could be arranged, isn't that right?

A. I was always told that Mr. Schenck's group was going to purchase the theatre.

Q. Wasn't it your understanding that United Artists Theatres Circuit was going to be the purchaser?

A. My definite understanding, Mr. Johnston, was that United Artists Theatres Circuit was going to do the booking and buying and be an owner in the theatre and we, too, were going to be owners in the theatre. They were making a group.

Q. Didn't you understand, Mr. Schreiber, that Mr. Schenck was acting in behalf of United Artists Theatres Circuit?

(Testimony of Max S. Schreiber.)

A. I can't honestly say that I knew he was acting with the United Artists Theatres. He talked about the United Artists Theatres. It was going to do the booking and buying [2206] of the theatre and we were going to be partners with them.

Q. That is right. And he was going to—your understanding was that he was going to make the theatre a part of the United Artists Theatres Circuit, isn't that right?

A. They were going to operate the theatre, yes.

Q. And make it a part of United Artists Theatre Circuit, isn't that right?

Mr. Corinblit: I object to that, your Honor, calling for a conclusion of the witness.

The Court: Overruled.

Q. (By Mr. Johnston): The answer is what?

A. May I have the question again?

(Question read.)

A. Evidently that is what was going to happen. He was going to make it a part of it.

Q. That is what your understanding was, isn't that right? A. Yes.

Q. What is the answer? A. Yes.

Mr. Johnston: Thank you. I have no further questions.

Redirect Examination

Q. (By Mr. Corinblit): Just one question, Mr. Schreiber. I think you testified Mr. Irving Epstein was present at that meeting? A. Yes.

Q. Mr. Irving Epstein is now an employee of Fox West Coast? [2208] A. Yes.

(Testimony of Max S. Schreiber.)

Q. He was at that time? A. Yes.

Q. He is alive? A. Yes.

Q. And he works for Fox West Coast now?

A. He does.

Mr. Corinblit: Thank you. No further questions.

The Court: You may step down.

(Witness excused.)

The Court: Call your next witness.

Mr. Corinblit: The plaintiff will recall for the purpose of damage testimony Mr. Alex Schreiber.

ALEX SCHREIBER

recalled as a witness by and on behalf of the plaintiff, having been heretofore duly sworn, was examined and testified further as follows:

Direct Examination

Q. (By Mr. Corinblit): Mr. Schreiber, the record shows the availabilities upon which your theatre operated during the period from August 23, 1950, to September 18, 1951, and the record also shows the gross receipts that were taken in.

Plaintiff's Exhibit 45-P-2 shows that the total admissions [2209] at the Paradise Theatre from August 1, 1950, to July 31, 1951, which is a period, incidentally, which will have to be somewhat adjusted, was \$76,064.32. Plaintiff's Exhibit 45-P-3 in evidence, upon the basis of the statement here, which will be somewhat adjusted by accounting testimony, shows a net loss in the Paradise Theatre of

(Testimony of Alex Schreiber.)

\$35,992.76 after depreciation for the period August 1, 1950 to July 31, 1951.

There is another amount we figured that is also in evidence which we will not go into at this time. These figures were the result of the operation on the availabilities that have been testified to.

Would you state, Mr. Schreiber, if the Paradise Theatre—first, do you have an opinion as to what the Paradise Theatre would have grossed, what the weekly gross receipts would have been if the Paradise Theatre had been able to operate during this same period upon a first run basis, that is, playing first run Los Angeles pictures, and the number of pictures being the number that you have testified to, an average of 35 to 40 top half and 35 to 40 bottom half? Do you have such an opinion?

A. I do.

Q. All right. Would you state what your opinion is?

Mr. Mitchell: Wait a minute. I object to the question upon the ground it is incompetent, irrelevant and immaterial, no proper foundation laid, pure speculation. [2210]

The Court: Well, Mr. Mitchell, we have a rule in law that the owner can testify as to value. He doesn't have to have any foundation. The owner can testify what the value is, what he thinks it is worth. It is not binding upon the jury.

Does a different rule apply in this case?

Mr. Mitchell: I would say so, yes. He is not testifying as to value, your Honor. It is an imaginary

(Testimony of Alex Schreiber.)

set of earnings. He can say anything, your Honor.

The Court: That's right.

Mr. Mitchell: And therefore it is speculative.

The Court: If I was on the witness stand and somebody asked me, "Have you got a car? How much is it worth?" I can say it is worth a thousand dollars, and it may not be worth \$50, but I can say a thousand dollars. That is legitimate, is it not?

The owner has a right to put a value upon his own property.

Mr. Mitchell: There are a great many courts that say it is not legitimate, would say it is pure speculation and has no foundation. That is the reason I am making the objection.

If you allow such testimony to be a basis of any kind of finding, it is really and realistically baseless, your Honor. I think anybody would recognize that. [2211]

The Court: Well, assuming for the purpose of argument, and this is argument only now, assuming for the purpose of argument that the plaintiff has established a liability. Now, how is he going to prove damage? What is his basis for proving damage? He is entitled to something. He has got to give some basis to the jury to determine.

Mr. Mitchell: Well, he will have to have some facts, rather than this kind of speculation. That is all I have to say, your Honor.

The Court: Well, I suppose they are going to show comparative theatres—are you not?

Mr. Corinblit: Yes, sir.

(Testimony of Alex Schreiber.)

Mr. Mitchell: Then comparative theatres on certain bases and with certain kinds of adjustments, and so on, get into a factual area, but this is into an imaginary area, where the plaintiff unrestrained can just give any old figure.

The Court: I am going to overrule the objection, but ladies and gentlemen of the jury, I think I should inform you that this is just an estimate on the part of the plaintiff and you don't have to accept his estimate at all. You are the one to determine from all the evidence what the damage is, if you find there is any damage at all. It is perfectly possible in a case like this that you may find there has been a violation, but the plaintiff hasn't been damaged at all, he is not entitled to anything. It is up to you to determine [2212] the amount, if you get that far along in this case.

Mr. Mitchell: Your Honor, will you also—excuse me.

The Court: Just a minute. You don't have to rely upon the testimony of this witness, but you are to consider the testimony of all the witnesses on this matter.

Yes, Mr. Mitchell.

Mr. Mitchell: Would you also instruct the jury they do not even have to consider this testimony if they find no liability. This is not on the question of liability.

The Court: That's right. You first have to determine there is a liability before you get to the question of damage. You mustn't discuss and you

(Testimony of Alex Schreiber.)

shouldn't discuss damage until you first determine that there is liability. So if you don't determine there is liability, then you don't have to consider this evidence at all. [2213]

Mr. Corinblit: Now, your Honor, I would like to ask your Honor to instruct the jury that any statement made by Mr. Mitchell on this particular point is not evidence.

The Court: I will instruct the jury that all statements of counsel are not evidence, either counsel for plaintiff or for the defendant.

Mr. Corinblit: Thank you, sir.

Q. Now, Mr. Schreiber, we should state once more how long you have been in the theatre business. A. A little over 37 years.

Q. And I think at the opening part of this case you described the extent of your experience with reference to theatre operations, is that right?

A. That is right.

Q. Now, will you state, please, for the jury, what in your opinion the Paradise Theatre on a first run basis, day and date with Los Angeles, would have been the weekly gross at the Paradise Theatre, operating on a basis of 35 to 40 top half, 30 to 40 bottom half first run pictures?

Mr. Johnston: It is understood our objection goes to this entire line.

The Court: Same objection and same ruling.

Mr. Mitchell: As to all this line of testimony.

The Court: You may have a continuing objection. The same objection and the same ruling.

(Testimony of Alex Schreiber.)

Mr. Corinblit: Thank you, sir.

Q. Would you state the figure, please?

A. The weekly grosses usually are based on the type——

The Court: That is not the question, Mr. Schreiber.

Q. (By Mr. Corinblit): Just the figure.

The Court: This is a technical matter and you shouldn't do anything except what the court allows you to do.

Now, the court is allowing you to answer these questions but not to make a speech.

The Witness: I was going to explain——

The Court: Do not explain. Just answer the question.

The Witness: An average of \$4500 a week.

Q. (By Mr. Corinblit): That would have been in your opinion the average weekly gross at the Paradise Theatre, is that correct?

A. That is right. May I explain?

The Court: First run Los Angeles?

Mr. Corinblit: First run.

The Witness: Can I explain how I arrived at that?

The Court: Not unless your counsel asks for it.

The Witness: Okay.

Mr. Corinblit: Now, at this time we will offer in evidence Plaintiff's Exhibit 45-Q-1, which is the profit and loss statement of the Loyola Theatre for the period involved.

The Court: In evidence. [2215]

(Testimony of Alex Schreiber.)

Mr. Mitchell: Your Honor, just a minute.

The Court: I was waiting for an objection. If I don't get an objection, I suppose that there is no objection.

Mr. Mitchell: May your ruling go out for the purpose of making an objection?

The Court: Yes.

Mr. Mitchell: I object to it on the ground that it is incompetent, irrelevant and immaterial. There is no proper foundation laid for it.

I admit it is the statement of the Loyola Theatre, but no proper foundation has been laid to show the propriety of the comparison.

I am really making this objection for the record, your Honor, because at a later time, at an appropriate time when we argue the whole problem here, which I think you will agree we may argue at some appropriate time, I want to be in position to move to strike this out. I am making the objection for the record.

The Court: This is a profit and loss statement for the Loyola Theatre?

Mr. Corinblit: Yes.

The Court: You say this is not a correct profit and loss statement?

Mr. Mitchell: No, I do not say so. I admit it is a profit and loss statement of the Loyola Theatre.

The Court: One of the ways to prove damages in a case like this is by comparing the plaintiff's theatre with other theatres. That is the established rule.

Mr. Mitchell: There have to be certain equalities

(Testimony of Alex Schreiber.)

of comparison, your Honor. And as I say, I am making this objection so I may at an appropriate time move to strike it out when we argue the whole problem. I don't want to argue it piecemeal.

The Court: The objection is overruled. It is admitted in evidence.

(The exhibit heretofore marked Plaintiff's Exhibit 45-Q-1, was received in evidence.)

Mr. Corinblit: I don't know if counsel wants me to do the subtraction here, but the combination of the records you have here show the Loyola's gross receipts were approximately——

Mr. Mitchell: This is just an argument, your Honor.

The Court: Can you stipulate as to what the gross receipts are in the profit and loss statement so he can put them on the board?

Mr. Corinblit: There is no need for a stipulation. What I will do for Mr. Mitchell, if he wants me to, is put on the total gross receipts and divide it by 52 in order to get at a weekly figure. I have done that and I would like Mr. Mitchell to agree with me that the figure is approximately [2217] \$4500 a week.

Mr. Mitchell: I haven't seen the figures at all.

The Court: What period of time is that for?

Mr. Corinblit: We have, your Honor, here two figures. The period—the ultimate period is the same. It will ultimately be from September 1—just a moment, please.

Mr. Mitchell: The only material period in this action is September 17, 1950 to September 17, 1951.

(Testimony of Alex Schreiber.)

That is the period in which we are charged with having conspired against this man and the period in which we are charged with having damaged him.

The Court: That is right, and no other figures other than for that period are material.

Mr. Corinblit: That is correct. I am not putting in anything else. We have figures here, the total figures and perhaps——

Mr. Mitchell: What time is it? Let us see what time you are talking about.

Mr. Corinblit: Don't you have a copy of this, Mr. Mitchell?

Mr. Mitchell: No, I do not have one before me.

Mr. Corinblit: It is stipulated between counsel that the average weekly gross of the Loyola Theatre for the period October 1, 1950 to October 1, 1951, and there is an overlap, is \$4500 a week. [2218]

Mr. Mitchell: Subject to our objection.

Mr. Corinblit: Yes, subject to your objection.

The Court: May I suggest that when you come to a discussion of the question of net revenue or net profit, it will depend on the overhead of each theatre. The overhead of a motion picture theatre is more than the price of the pictures.

Now, do we have any testimony here as to the number of employees in the various theatres, the amount of the overhead or anything like that?

Mr. Corinblit: Your Honor, in evidence here is the cost, total cost of operation of the Paradise Theatre, the cost of the operation of the Loyola

(Testimony of Alex Schreiber.)

Theatre and we will put in the cost of the operation of the Academy Theatre.

The Court: You have that?

Mr. Corinblit: Yes, and there will be testimony to make the necessary adjustments. This is on a first run basis. [2219]

Q. Now, Mr. Schreiber, on a first run basis, where the gross receipts were \$4,500 a week, do you have an opinion as to what would have been and what would be a reasonable film rental to be paid for first run pictures based upon this same first run situation? A. I have.

Mr. Mitchell: Same objection.

The Court: Same ruling.

Mr. Mitchell: To all this line of questions, your Honor.

The Court: You may have a continuing objection; same ruling, continuing the same ruling.

Q. (By Mr. Corinblit): And what in your opinion would be a reasonable film rental?

A. 40 per cent of the gross receipts.

Q. Have you computed from the Loyola film rental the approximate film rental percentage paid by the Loyola? A. I did.

Q. For the same period indicated. What was that percentage?

Mr. Johnston: Your Honor, I object to that as being immaterial, inasmuch as Fox owned the Loyola Theatre and the rental paid is a matter of complete immateriality in this proceeding here.

The Court: If the jury doesn't have this infor-

(Testimony of Alex Schreiber.)

mation, [2220] how can it arrive at any estimate at all? It has to have something to base its findings on.

Mr. Johnston: Simply this. The figure that the Loyola paid for film rental is meaningless because they might have paid \$1.00 or \$10. If they owned the theatre, they could pay anything they wanted to.

The Court: That is perfectly true. They could pay anything they wanted to.

Mr. Johnston: There is no impropriety in their paying anything they wanted to.

The Court: Objection overruled.

Q. (By Mr. Corinblit): What was that percentage, Mr. Schreiber?

A. I believe the percentage was between 30 and 31 per cent.

Q. Now, the other thing that enters into the results at the Paradise Theatre, had you exhibited the pictures on a first run basis, would be expenses, is that right? A. That is correct.

Q. All right. Now, in the theatre business, a theatre business in a sense is a little unusual about this matter of expenses, isn't it, Mr. Schreiber, that is, what are the facts as to, for example, whether certain expenses remain the same, even though your gross receipts go up? Are there certain items of expense that remain the same? [2221]

A. That's right.

Q. Would you give me an example of that?

A. Well, your electric light is the same, your water is the same, your help is practically the same,

(Testimony of Alex Schreiber.)

use the same cashier, use the same doorman, use the same manager, use the same assistant manager, and use three or four usherettes. It is all the same.

Your taxes are the same, your insurance is the same, your heating is the same, your janitor supplies are the same. Your inside advertising is the same. If you have four frames, you keep four frames with advertising on it. The same four pictures are advertised week in and week out. You have the same space.

Your carbons to project the pictures on the screen cost the same whether you are showing to 1200 people in the theatre, you are showing to a hundred people in the theatre, or if you are showing to 50 people in the theatre. That cost is the same.

Q. If you go to a policy which results in a larger amount of gross receipts, however, there are some expenses which may increase, is that right?

A. Yes, that's right.

Q. All right. One of the important differences in expenses between running on a subsequent run policy, as the Paradise Theatre operated, as distinguished from a first run [2222] policy, is the matter of advertising, isn't that right?

A. That is correct.

Q. Plaintiff's Exhibit 45-P-2 shows that for the period August 1, 1950, to July 31, 1951, the advertising figure is \$12,830.35. That includes some other advertising, but we will get to that in a minute.

Having in mind the advertising the Paradise

(Testimony of Alex Schreiber.)

Theatre was doing playing on the policy it did play, playing in that position, would there have been an increase in the advertising expenses for the Paradise Theatre if it operated on a first run policy, as you described it? A. Yes.

Q. What does that increase represent, what kind of activities do you have on first run that are not ordinarily carried out as a 7 day theatre in advertising?

A. You do more advertising in the metropolitan newspapers.

Q. That is, these large displays that we ordinarily see in the newspapers have to do with first run theatres, and the 7 day theatre ordinarily does not participate in that? A. No, they do not.

Q. On a first run basis, you would?

A. That's right.

Q. And that involves increased expense?

A. That's right, although when we got a 7 day picture, [2223] we took some additional advertising in the paper so we could let our patrons that were in the theatre know that we were running an early picture, 7 day. We wanted them to know about it because it was such a rare occasion.

Q. This increased advertising would result in increased expense for the Paradise Theatre, and I want you to give us what the figure for advertising would be, the increased amount, not the total figure, but the increased amount for advertising.

The Court: Mr. Corinblit, before you get into that——

(Testimony of Alex Schreiber.)

Mr. Corinblit: Yes, sir.

The Court: You had 40 per cent for your film rental. Does that include second feature, too?

Mr. Corinblit: That is total, your Honor.

The Court: You mean you are not talking about 40 per cent for the first feature, but you are talking about all the film rental?

Mr. Corinblit: Yes, sir.

The Court: Then the 30 to 31 for the Loyola, is that all the film rental?

The Witness: Yes, sir.

Mr. Corinblit: Yes, sir.

The Court: All of it?

Mr. Corinblit: First and second feature.

The Court: All right. [2224]

Q. (By Mr. Corinblit): Now, will you state what, in your opinion, would be the increased expense re advertising at the Paradise if you operated on first run policy as you have described?

A. An additional \$150 a week, or a little over \$7,500 a year.

Q. Now, in addition to an increased expense with regard to advertising, if you had more people coming in at the box office, larger gross receipts, would you have had an increase in the total salaries that you would have paid at the Paradise Theatre?

A. We would have.

Q. Would that be—well, first, give me the figure it would have been, the increased salary, and then you can explain what the figure is.

(Testimony of Alex Schreiber.)

A. An average of \$100 more a week to our employees.

Q. Now, would you explain what that \$100 would represent?

A. It would represent an increase to our motion picture operators, who would immediately go from the scale that we are now paying to a first run scale like the Loyola, which would run about \$36 a week increase. When we would go to a first run policy, we would have to pay the first run scale.

In that case, where we would gross \$4,500 a week on a first run policy, our manager would be compensated an additional [2225] \$10 or \$15 a week.

In order to give the people good service, we would hire another usherette. These usherettes work after school usually and they come in at 6:30 and they work until about 9:30 at night, so there would be maybe the expense of another usherette.

The janitor, because of that increase in business, would need a helper over the week-end, Friday, Saturday and Sunday. He would require a helper to help him clean up—there would be more popcorn boxes and candy wrappers and so forth—clean up the theatre and watch everything so the theatre would be always clean and immaculate.

There may be an increase to the cashier and there may be an increase to the doorman, which would run about \$100 a week for our employees.

Q. Now, if you had had a first run policy with these gross receipts, paying this film rental and these increased expenses that you have indicated,

(Testimony of Alex Schreiber.)

would you have had an increase in miscellaneous expenses?

A. Well, it is always best to figure some miscellaneous items that come up from time to time, and it is best to figure around \$1,000 a year, or roughly \$20 a week.

Q. Mr. Schreiber, if instead of a first run policy, the only policy that had been permitted to you was a policy of playing pictures 7 days after Los Angeles first run closing, do [2226] you have an opinion as to what would have been the gross of the Paradise Theatre on that 7 day policy? Do you have an opinion? A. I do. [2227]

Mr. Corinblit: Before you give me that opinion, I would like to offer in evidence Plaintiff's Exhibit 45-Q-2 which is a profit and loss statement from the files of the defendant Fox pertaining to the Academy Theatre.

Mr. Mitchell: One minute. I object to that upon the ground it is incompetent, irrelevant and immaterial. There has been no proper foundation laid. However, I am not objecting to it on the ground—I admit that it is—what do you call it, a profit and loss statement of the Academy Theatre.

My objection goes to the other factors.

The Court: Objection overruled. It is admitted in evidence.

(The exhibit heretofore marked Plaintiff's Exhibit 45-Q-2, was received in evidence.)

Mr. Corinblit: This is the Academy and this is

(Testimony of Alex Schreiber.)

the Paradise. I have written at the top: "Seven Day Policy on Seven Days."

Now, first, let me get this stipulation, that is that on the average weekly gross on the Academy we find it is approximately \$3800.

It is agreed and stipulated that the Academy gross receipts for an average of \$3800 per week.

Q. Now, Mr. Schreiber, what would your opinion have been as to what the Paradise would have grossed on a 7 day policy? [2228]

A. The same figure, \$3800 weekly receipts.

Mr. Corinblit: There is one other figure that I would like to have agreed to, and that is the total film rental paid at the Academy for a 54-week period. First a 52-week period indicated by the same schedule and my figures show approximately \$88,000.

Mr. Westbrook: For 52 weeks \$88,000.

Mr. Corinblit: Now, you take $2/52$ of that makes an addition of approximately \$3,400 so we would have a film rental for those 54 weeks of——

The Witness: That is pretty small, Mr. Corinblit.

Mr. Corinblit: We will put in a larger chart to show these figures.

It is a total figure of \$91,400 at the Academy.

Now, what would be the film rental——

Mr. Mitchell: Are you making a 54-week period out of this by that adjustment?

Mr. Corinblit: I am putting it on a 54-week period.

(Testimony of Alex Schreiber.)

Mr. Mitchell: The period involved in this action is 52 weeks.

Mr. Corinblit: Your Honor, the period involved in this action runs from August 23, 1950 to September 17, 1951.

Mr. Mitchell: That is incorrect. If you will look at the complaint, your Honor, paragraph 25——

* * * * *

The Court: Or the amended complaint. The amended complaint was filed on January 23, 1952.

Mr. Corinblit: Yes. We don't have any quarrel about the amended complaint relating back to the filing of the original.

The Court: That paragraph doesn't state when the damage period started.

Mr. Corinblit: That is right, but the damage "to date" of course means when the theatre opened. What other date would be indicated?

Mr. Mitchell: You can't be damaged unless by some conspiratorial act and he says the conspiratorial acts were [2231] prior, one year prior to the filing of the complaint, and that is September 17, 1950, to September 17, 1951. That is when we were conspiring and no other time.

The Court: You say "for the last year past."

Mr. Mitchell: I should say alleged to be conspiring.

The Court: And to the present time.

Mr. Corinblit: Well, your Honor, that with respect to all the allegations of liability——

The Court: That is what we are talking about.

(Testimony of Alex Schreiber.)

Mr. Corinblit: That is right, but when we come to the damage paragraph, your Honor, we talk about being damaged up to the time the complaint was filed.

Now, that is from the opening. We also alleged in the complaint that the theatre was opened on August 23, 1950.

The Court: I am going to restrict you to one year.

Mr. Corinblit: Very well, your Honor.

Let the record show the plaintiff takes an exception to the ruling of the court.

The Court: Yes, the record may show an exception to the ruling of the court. I expect we will have a lot of exceptions.

Mr. Mitchell: As I understand it, everybody has an automatic exception. Every time there is an adverse ruling, the party has an automatic exception.

The Court: You don't have to take an exception any more. [2232]

Mr. Corinblit: All right.

The Court: Don't you want to change your figures back to the original figure?

Mr. Corinblit: I am going to do that, your Honor.

The figure for the 52-week period is approximately \$88,000.

Q. Now, Mr. Schreiber, do you have an opinion as to what the Paradise Theatre would have paid for 7 day pictures operating on the 7 day policy

(Testimony of Alex Schreiber.)

described, during the same period? What would have been the film rental?

A. The film rental would have been the same as the Academy film rental.

Q. \$88,000.

Now, if the Paradise Theatre had operated on a 7 day, a 7 day after Los Angeles first run closing, what would have been, if any, the changes—the increased expenses that the Paradise Theatre would have incurred?

A. Very little increase. It would be just practically that miscellaneous item there of \$20 a week.

Q. There would be no increase for advertising, is that right?

A. No, because we had already spent over \$12,000 for advertising, so there would be no increase in that. [2233]

Q. And there would be no other increase in salaries and expenses, is that right?

A. No, because the operators, the two men in the booth that we had, the salary would remain the same, because it was not a first run policy.

Q. So the only increased expenses would have been roughly \$20 a week?

A. Yes, miscellaneous expenses.

Q. \$1,000 per year. Now, under the evidence, the schedule that has been put in, and as I say it will be somewhat adjusted, the record shows a loss for the Paradise Theatre for the period August 1, 1950, to July 31, 1951, of some \$36,000.

(Testimony of Alex Schreiber.)

The Loyola Theatre profit for the period of one year——

Mr. Mitchell: Let's see what year it is, because we are talking about September 17, 1950, to September 17, 1951.

Mr. Corinblit: All right. The same year. We will take the figures for the Loyola.

The Court: Mr. Corinblit, can you tell me from your figures there what was the cost of operating the theatre for a year, other than film rental?

Mr. Corinblit: Other than for film rental for the year, your Honor? [2234]

The Court: Yes.

Mr. Corinblit: Yes. Approximately \$78,000.

The Court: Approximately \$78,000?

Mr. Corinblit: Let me check that. Yes, sir. Approximately \$78,000.

Do you have that figure now, counsel? I want the net profit for the Loyola Theatre for the year. Approximately \$66,000?

Mr. Westbrook: That is approximately correct.

Mr. Corinblit: All right.

Mr. Westbrook: Counsel, can we have a stipulation that this doesn't cover the exact period you are talking about? It is October 1, 1950, to September 29, I believe it is, 1951.

Mr. Corinblit: September 30th. Yes, that's right. There is a slight overlap of about 17 or 15 days.

So the figure for the net profit for the Loyola for the same period, for the year period, is approximately \$66,000.

(Testimony of Alex Schreiber.)

The Court: The Loyola?

Mr. Corinblit: Yes, sir.

The Court: Is that net profit?

Mr. Corinblit: Yes, sir, after depreciation.

Now, can we get a stipulation with respect to the Academy Theatre? [2235]

Mr. Westbrook: Do you have the figure?

Mr. Corinblit: Yes. (Handing document to counsel.)

Mr. Mitchell: These stipulations we are making, your Honor, are all subject to the objection.

The Court: All subject to the objection.

Mr. Westbrook: Approximately \$44,000 for the same period we stipulated to previously.

Mr. Corinblit: Yes. Approximately \$44,000.

The Court: Mr. Corinblit, let's stop right there for a minute.

Mr. Corinblit: Yes, sir.

The Court: And let's discuss a problem or two. You are comparing the plaintiff's theatre with the Loyola, a first run theatre.

Mr. Corinblit: Yes, sir.

The Court: And the Academy, a 7 day theatre.

Mr. Corinblit: Yes, sir.

The Court: You don't contend that the plaintiff could have run its theatre better than the Loyola, so it made a greater profit than the Loyola Theatre, do you?

Mr. Corinblit: No, your Honor. I think the figures come out overall, but the total profit, no, your Honor.

(Testimony of Alex Schreiber.)

The Court: All right. Then the jury would be limited, would it not, then, that is, if the jury found that there was a conspiracy and the plaintiff has been damaged because [2236] of the first run situation, the jury would be limited then to the net profit of the Loyola, which would be \$66,000. They couldn't go over \$66,000?

Mr. Corinblit: There is only one difficulty there, your Honor. You will find there is a little different figure. The plaintiff suffered a \$36,000 loss here. We are going to put that on right now.

The Court: Well, all right. On a first run policy, the plaintiff couldn't have made more than \$66,000.

Mr. Corinblit: That is correct, your Honor.

The Court: You will agree to that?

Mr. Corinblit: Yes, sir. We will accept that proposition.

The Court: Then if the jury found there is a conspiracy as far as the 7 day policy is concerned, the plaintiff can't recover more than \$44,000.

Mr. Corinblit: For the profit.

The Court: For the profit.

Mr. Corinblit: Again, we still lost \$36,000.

The Court: You will add \$36,000 to that.

Mr. Corinblit: Right.

The Court: But you got \$44,000 profit.

Mr. Corinblit: That's right.

The Court: Now, the plaintiff can't recover \$66,000 and \$44,000, can he? [2237]

Mr. Corinblit: No, sir.

(Testimony of Alex Schreiber.)

The Court: In other words, they are limited to one or the other.

Mr. Corinblit: Yes, sir.

The Court: They can't add both of them together?

Mr. Corinblit: No, sir.

The Court: So under this theory, then the plaintiff's damage would be \$66,000 plus the loss, whatever it is.

Mr. Corinblit: That is correct. [2238]

* * * * *

Q. (By Mr. Corinblit): Mr. Schreiber, there are only one or two other things that I want to ask you about before we put the accountant on the stand to bring these figures down to the actual damage figure.

When you testified that you would gross on the average at the Paradise on first run policy \$4500 a week, you were not stating to the jury that you would take \$4500 in every week at the Paradise?

The Court: That was the average gross.

Mr. Corinblit: Yes. I wanted to make that clear. I wanted to make it clear that some weeks would be up and some weeks would be down.

The Witness: That is correct.

Q. (By Mr. Corinblit): And the same thing, of course, is true with respect to the \$3800 gross on the 7 day policy? A. That is right.

Q. Now, bringing these figures down to the actual damage figures—those figures are in the possession of the accountant, is that correct?

(Testimony of Alex Schreiber.)

A. That is correct.

Mr. Corinblit: We have no further questions of Mr. [2240] Schreiber at this time.

Cross Examination

Q. (By Mr. Westbrook): Now, Mr. Schreiber, in reaching your opinion as to the average gross of the Paradise on a 7 day availability as the consistent policy, I take it you took into consideration the grosses that you actually achieved on 7 day pictures during the period in question, is that correct?

A. No, I didn't take into consideration the business we did on 21 day pictures or 14 day pictures or 7 day pictures or 14 day pictures and re-issue pictures and a picture that was four months old or maybe four years old. I didn't use those figures to arrive at \$3800 or \$4500.

Q. I would like to place before you Plaintiff's Exhibit 45-J in evidence, which is the payoff of the Paradise Theatre and consider with you for a moment then the actual performance of the Paradise Theatre on 7 day top-half features.

Now, starting with Exhibit 45-J, you played a picture on a 7 day availability at the top-half of the double bill during the week of August 23 to 29, 1950, did you not? A. What are the dates?

Q. 23rd to 29th?

A. Yes. I played—what I played I didn't hear.

Q. A picture on a 7 day availability as the top-half [2241] of a double bill?

(Testimony of Alex Schreiber.)

A. Yes, I played a 7 day picture but it was not a top picture.

Q. Your gross on that picture was \$1875, is that right?

A. Just a minute. We are not comparing——

The Court: Just a minute, Mr. Schreiber. [2242]

* * * * *

Q. (By Mr. Westbrook): Your answer to my question is "Yes," is it not, Mr. Schreiber, that during that week your gross receipts were \$1875?

A. Yes, with a 7 day and 21 day picture. [2243]

Q. During the next week, you also played a 7 day picture as the top half of the bill and grossed \$2,139, is that right?

A. With a 7 day and 14 day picture.

Q. The next week, with a 7 day picture at the top half of the bill, you grossed \$1,522, is that right?

A. Yes, with a 21 day picture.

Q. The next week, with a 7 day picture at the top half of the bill, you grossed \$2,125?

A. That's right, with a 14 day picture.

Q. The next week, with a 7 day picture, you grossed \$1,585?

A. With a 14 day picture.

Q. Now, dropping down to October 5 to 11, 1950, you had the Paramount picture *Sunset Boulevard*, is that correct?

A. That is correct.

Q. On a 7 day availability. A. Yes, sir.

Q. There is no question in your mind that that was a top picture?

A. It was a top picture made by Paramount, that's right.

(Testimony of Alex Schreiber.)

Q. Your gross on that picture during that week was \$3,849, is that right?

A. With a 14 day picture. [2244]

Q. Dropping down to the week of October 19 to 24, you played a Columbia re-issue combination on the 7 day, is that correct?

A. Please, that is a 7 day re-issue about five years old or four years old.

Q. You played that day and date with another theatre in the Inglewood area, did you not?

A. I don't know.

Q. You played it day and date with the United Artists, do you not recall that?

A. No, I do not recall, because there is no indication here.

Q. Let's leave that one out, then, Mr Schreiber.

A. Academy didn't run those type of pictures.

The Court: Don't argue with counsel. Just answer the question.

Q. (By Mr. Westbrook): Going down to the picture Born Yesterday you testified yesterday that was a very outstanding picture, Mr. Schreiber, that played with 7 day availability, and your gross was \$3,718, is that right? That is in March 1951.

A. That is correct, with a 21 day picture.

Q. Now, April 4 to 10 you played a 7 day picture at the top half of the bill and grossed \$2,003, is that right?

A. With a 21 day picture, yes, sir. [2245]

Q. And on May 4 to 10 you played Samson And

(Testimony of Alex Schreiber.)

Delilah on a 7 day availability on its regular release and grossed \$2,291, is that right?

A. There is a question whether that was a regular release. That was about the third time the picture had been played, and it played with a 14 day availability.

Q. I think the stipulation is it played once before in the Inglewood area about a year and a half before.

A. Yes, and it played first run for a long time.

Q. But you had that picture and you grossed \$2,291, is that correct?

A. That is correct, with a 14 day picture.

Q. Now, the week of May 17-22, 1951, you had a 7 day picture at the top half of the bill and grossed \$1,795, is that right?

A. Yes, with a 28 day availability.

Q. That was the program that Mr. Lehman testified about yesterday, with Father's Little Dividend, an outstanding MGM picture, where he said he had out-booked the Fifth Avenue, is that right?

A. Yes, with a better program for the public.

Q. Dropping down now to the week of August 15, to 21, 1951, you had the top half of a bill filled with Sirocco, a Columbia picture, on the 7 day availability, is that right?

A. That is correct, both pictures were 7 days.

Q. Both pictures were 7 days.

A. One was a western and one was an action picture, yes, sir.

(Testimony of Alex Schreiber.)

Q. \$1,850 that week, is that right?

A. That's right.

Mr. Westbrook: Now, counsel, will you accept my total on these figures, subject to check, \$24,752?

Mr. Corinblit: Your addition is correct.

Q. (By Mr. Westbrook): Mr. Schreiber, we have 11 weeks of 7 day pictures at the top half of the bill here, right?

A. Starting with August 23?

Q. Yes. A. That's right.

Mr. Westbrook: Dividing 11 into 24,752, we come out with a figure of 2,250, counsel, is that correct?

Mr. Corinblit: That is correct. Your division is correct.

Q. (By Mr. Westbrook): That figure, Mr. Schreiber, is your average gross on 7 day pictures in accordance with your actual performance in the theatre, is that right?

A. That is with the second features 14 day, 21 day, 28 day and one picture 7 day combination.

Q. That is the actual figure, though?

A. That is.

Mr. Westbrook: Thank you very much. [2247]
No further questions.

Mr. Johnston: No questions.

Redirect Examination

Q. (By Mr. Corinblit): Mr. Schreiber, Mr. Westbrook started August 23, 1950, and the total weeks, August 23 to the end of the play-off, is about

(Testimony of Alex Schreiber.)

55 weeks, is that right? A. That's right.

Q. You played in 55 weeks for 11 weeks with a 7 day picture at the top half of the bill, is that right?

A. According to Mr. Westbrook's figures, yes.

Q. That is about 20 per cent in terms of number of weeks, about 20 per cent?

A. Yes, about one-fifth.

Q. So on the average the amount of time between a 7 day picture in the Paradise Theatre is about what? Four weeks?

A. Every fifth week.

Q. We have got the Academy actual figures over here, right? A. Yes, sir.

Q. And this is what the Academy Theatre actually grossed on a 7 day policy, \$3,800 a week, isn't that right? A. That's right. [2248]

Mr. Mitchell: I object to that as being argumentative, and not proper cross examination.

The Court: Sustained.

Q. (By Mr. Corinblit): Would you compare, Mr. Schreiber—

Mr. Mitchell: I mean really that it is not proper redirect.

Q. (By Mr. Corinblit): Would you compare Mr. Schreiber, between the Paradise and the Academy whether you observed, did the Academy play 7 day pictures one every four weeks?

A. No, they played every single week and they played two top 7 day pictures on a program. They

(Testimony of Alex Schreiber.)

played Paramount and Fox, Paramount and Universal, Paramount and Warners, or a Fox and Warners, and they played top pictures on the order of Guys And Dolls and The Lieutenant Wore Skirts and the Searchers, and Meet Me In Las Vegas, those type of pictures.

The Court: Now, you mustn't argue the case to the jury. That is what you are paying your counsel for.

Mr. Corinblit: No further questions. [2249]

Recross Examination

Q. (By Mr. Westbrook): Mr. Schreiber, the first five weeks you were open you played consistently on a seven-day policy, did you not, with a top feature?

A. Yes, with 21 days and 14-day pictures.

Q. Now, you spoke about the Academy second features, Mr. Schreiber, during the time that you were open.

Do you recall the Monogram picture Show Dog that was playing at the Academy as the second feature the week that you opened the Paradise Theatre?

A. No, but if you show me the booking, if that is the booking that was the booking.

Q. You don't have any recollection of that picture, though? A. No, I do not.

Q. You don't recall it playing at the Academy?

A. No. One picture out of 110 pictures—no.

(Testimony of Alex Schreiber.)

Q. Let us go on to the next week. Do you recall a Republic picture *Savage Horde* which played as the second feature at the Academy Theatre during that week?

A. No, I don't. I don't even know the picture.

Q. Now, the following week you recall the Monogram picture *County Fair* that played at the Academy as the second feature? [2250]

A. No, I don't.

Q. The following week do you recall the Columbia picture *When You Are Smiling* that played as a second feature?

A. Yes, I think we played that picture, also. I think we may have played that as a first picture. I don't know.

Q. You recall that picture?

A. I remember the title, yes. What did it play with, Mr. Westbrook?

Q. Where?

A. *When You Are Smiling* at the Academy?

Q. At the Academy? If you want me to testify, Mr. Schreiber, I will.

A. Well, if it was playing with a picture like *King And I* and *Guys And Dolls* that they are talking about here all the time, it wouldn't make any difference what they had on there. You could have appeared in a picture and it would not have made any difference.

Q. Thank you, sir.

A. Let us talk about picture for picture.

(Testimony of Alex Schreiber.)

The Court: Mr. Schreiber, just a moment.

Q. (By Mr. Westbrook): In October 1950 do you recall a Republic picture Surrender playing the second half of a double bill at the Academy Theatre? A. When?

Q. October 1950. [2251] A. Surrender?

Q. Yes. A. I don't remember.

Q. Do you remember the Monogram picture titled Hidden City playing at the Academy in 1950, playing the second half of a double bill?

A. No, I don't remember that one either.

Q. Do you remember the Republic picture Rio Grande playing at the Academy Theatre on the second half of a double bill?

Mr. Corinblit: When was that?

Mr. Westbrook: November 1950. Excuse me. That one played top half, I am sorry.

The Witness: It must have been a big picture then.

Q. (By Mr. Westbrook): Do you recall a Monogram picture titled Hot Rod playing as the second half of a double bill at the Academy Theatre?

A. I remember the picture and if I am not mistaken we would have liked to have had that for a first picture at the Paradise.

Mr. Corinblit: Mr. Schreiber, don't volunteer any information. Just answer the questions.

The Witness: I am sorry.

Q. (By Mr. Westbrook): Do you recall the——

(Testimony of Alex Schreiber.)

Mr. Corinblit: Will you give us the approximate month? [2252]

Mr. Westbrook: January 1951.

Q. Do you recall the Republic picture *Pride Of Maryland* playing as a second feature at the Academy Theatre?

A. I think that was a race horse picture story and we would liked to have had that one, too.

Q. Do you recall that the Academy Theatre played *American Guerilla In The Philippines* after you played it first run Los Angeles?

A. What was that one?

Mr. Corinblit: First run Los Angeles?

Mr. Westbrook: I am sorry, I have the wrong picture.

Mr. Corinblit: And wrong year.

The Witness: We would liked to have that one also.

Q. (By Mr. Westbrook): Do you recall the Lippert picture *Three Desperate Men* playing the second half of a double bill at the Academy?

Mr. Corinblit: What month?

Mr. Westbrook: January 1951.

The Witness: No, I don't remember that picture.

Q. (By Mr. Westbrook): Do you recall the Eagle-Lion picture *Wicked City* playing as the second feature at the Academy Theatre in February 1951? A. No, I don't recall that.

Q. Do you recall the Monogram picture *Bowery Battalion* playing as the second feature in the Academy Theatre in March [2253] 1951?

(Testimony of Alex Schreiber.)

A. Bowery Battalion?

Q. Yes.

A. I think that was those Bowery boys, I am not sure.

Q. Do you recall the Republic picture *Secrets of Monte Carlo* playing as the second feature on a double bill at the Academy Theatre in June 1951?

A. What is the picture?

Q. *Secrets of Monte Carlo*.

A. From whom?

Q. Republic. A. No.

Q. Do you recall the Monogram picture *According to Mrs. Hoyle* playing as the second feature in a double bill at the Academy Theatre in July 1951?

A. No.

Q. Do you recall the Monogram picture *Casa Manana* playing as the second feature at the Academy Theatre in July 1951?

A. From what distributor?

Q. Monogram. A. No, I don't remember that.

Q. Do you recall the Monogram picture *Yukon Manhunt* playing as the second feature at the Academy Theatre in August of 1951? [2254]

A. No, I don't remember that one.

Q. Do you recall the Republic picture *Sea Hornet* playing at the Academy Theatre as the second feature in September, 1951? A. No.

Mr. Westbrook: I have no further questions.

Mr. Corinblit: Counsel, will you state with me one fact—will you stipulate with me that each and

every picture that you mentioned was on a 7 day availability at the Academy Theatre?

Mr. Westbrook: Each and every picture I believe was on a 7-day availability and probably played after the Loyola Theatre played it first run.

Mr. Corinblit: No further questions.

The Court: You may step down.

The Witness: Thank you.

Mr. Corinblit: Will Mr. Joseph Youtan take the stand.

JOSEPH S. YOUTAN

called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

The Clerk: State your full name.

The Witness: Joseph S. Youtan. [2255]

Direct Examination

Q. (By Mr. Corinblit): Mr. Youtan, what is your occupation?

A. I am a certified public accountant.

Q. And how long have you been a certified public accountant? A. Twelve years.

Q. Are you a member of any societies?

A. Yes, I belong to the California Society of Certified Public Accountants.

Q. And have you been in active practice as a certified public accountant in California?

A. I have.

Q. Have you since 1949 or 1950 been the accountant for the plaintiff in this case, the Paradise Theatre Building Corporation? A. Yes, sir.

Q. You have been in charge of their books and

(Testimony of Joseph S. Youtan.)

records and in charge of preparing their profit and loss statements and so forth, is that correct?

A. Yes, sir.

Q. At my request, Mr. Youtan, have you prepared certain schedules pertaining to the losses at the Paradise Theatre based on a 52-week basis?

A. I have. [2256]

Q. As a matter of fact, your original schedules were prepared on a 54-week basis, is that correct?

A. Yes, adjusted to 52 weeks during the recess.

Q. You had to adjust them to 52 weeks in the light of the court's ruling this morning?

A. Yes.

Q. Now, I will ask you to place before you first the document which you have entitled "Paradise Theatre Recomputation of actual net loss for comparison with reconstructed net profits."

Now, in columns A and B you have set forth the figures showing the actual net loss—first, in column A the actual net loss as per the books of the Paradise Theatre from August 1, 1950 to July 31, 1951, is that right? A. Yes, sir.

Q. That net loss for that period amounted to how much money? A. \$35,000.

Mr. Mitchell: A schedule is being used and it is hard to follow without a copy of it. May we have a copy, or isn't there another copy available?

Mr. Corinblit: I am sorry there is not. I will be glad to have you look at this because the re-computation that had to be done—we have copies on the 54-week period.

(Testimony of Joseph S. Youtan.)

Do you have that extra copy? [2257]

The Witness: I don't have a third copy with the revision, although I do have several other copies on a 54-week basis.

Mr. Corinblit: All right.

Mr. Westbrook: May we have one of those?

Mr. Corinblit: Yes. Let me have the schedule.

The Witness: It would only take me about one minute to prepare a third copy, if you wish. [2258]

Q. All right. A. The basic information.

Q. Put the figures in so that counsel may be able to follow us.

Mr. Westbrook: Your Honor, while we are waiting for Mr. Youtan, I neglected to offer the schedule we just prepared on the blackboard, which I would like to do now.

The Court: It may be received in evidence.

Mr. Westbrook: I believe that would be joint distributors' Exhibit U.

The Clerk: Joint Distributors' Exhibit U.

(The exhibit referred to was received in evidence and marked as Joint Distributors' Exhibit U.)

Mr. Corinblit: Are these all the schedules now?

The Witness: Yes, a full set.

Mr. Corinblit: Thank you. (Handing document to counsel.)

Q. Now, turning to the schedule, under Column A, Mr. Youtan, per the books of the Paradise Theatre, there was a net loss for that period, August 1, 1950, to July 31, 1951, of how much?

(Testimony of Joseph S. Youtan.)

A. \$35,992.76.

Q. And taking the two-month period August 1, 1951, to September 30, 1951, a two-month period, there was a net loss for that period of how much?

A. \$3,312.72.

Q. So that the total net loss per the books for a total period of 60 weeks, which we will then reduce, was how much? A. \$39,305.48.

Q. That is represented by the figure under Column C, is that correct? A. Yes, sir.

Q. That is for a 60-week period?

A. Yes, sir.

Q. You made certain adjustments, that is, you withdrew certain items from the figures showing the total loss and the total figures, and I want to go into those for a minute. There was a figure in the total loss for the 60 weeks in terms of income of store rents, is that right? A. Yes, sir.

Q. What was that total figure?

A. \$4,067.78.

Q. And that represented the rentals from two stores in the Paradise Theatre Building?

A. Yes, sir.

Q. That was withdrawn? A. Yes, sir.

Q. That is from the gross receipts end of the picture. Now, from the expenses you also withdrew certain items. The first item you withdrew, I notice, is a proportion of an [2260] amount applicable to interest on the mortgage, is that correct?

A. Yes, sir.

(Testimony of Joseph S. Youtan.)

Q. Now, how much did you pull out, interest on the mortgage?

A. $12\frac{1}{2}$ per cent of the total interest.

Q. What was the basis upon which you withdrew $12\frac{1}{2}$ per cent of the total interest?

A. It was based on the square foot area occupied by the two stores as related to the total area of the Paradise Theatre Building.

Q. Do you have the total area of the Paradise Theatre Building? A. I do.

Q. Would you state that for the record, please?

A. 20,718 square feet.

Q. And the total area occupied by the stores, two stores, is what area?

A. 2,596 square feet.

Q. And that percentage is about what?

A. $12\frac{1}{2}$ per cent.

Q. So that where the Paradise was paying interest based upon a mortgage on a building which covered both the theatre and the stores, when you pulled out the gross receipts from the store rents, you pulled out the expenses, the [2261] proportionate expenses applicable to interest, is that correct?

A. That is correct, sir.

Q. You also pulled out a certain amount of money re taxes on the building, is that correct?

A. Yes, sir.

Q. How much did you withdraw?

A. \$288.33.

Q. And the basis upon which you withdrew those expenses from the schedule is what?

(Testimony of Joseph S. Youtan.)

A. The same basis as was followed with respect to the interest.

Q. That is the proportionate amount of taxes applicable to the store portion of the building?

A. Yes, sir.

Q. Now, you also withdrew, going down to the bottom of the schedule, re depreciation on the building, did you also withdraw a certain amount of money from the expense part of the schedule?

A. Yes, sir.

Q. How much did you withdraw?

A. \$715.01.

Q. What was the basis upon which you made that withdrawal?

A. The same formula that was followed with respect to interest and taxes. [2262]

Q. That is 12½ per cent of the total depreciation was withdrawn because that is applicable to the stores? A. That is correct, sir.

Q. Now, you have one other item, and that is an item, legal and audit. How much did you withdraw from that expense item? A. \$2,500.

Q. What was the reason for that withdrawal?

A. That was expenses which in my opinion were not proper ordinary expenses of the theatre.

Q. That is, they were extraordinary expenses and therefore in a fair operating statement should not be included for purposes here?

A. Yes, sir.

Q. They are perfectly proper in terms of the corporation itself, is that correct?

(Testimony of Joseph S. Youtan.)

A. Yes. They would be deductible for income tax purposes.

Q. But for purposes of a fair operating statement for here, you withdrew them, is that correct?

A. Yes, sir.

Q. The total amount withdrawn, you say, is how much? A. \$2,500.

Q. So that the adjusted loss, taking out the store rents — well, now, there is one other item. What change did [2263] you make with respect to the item of salary? Would you explain any change you made there, if there was any change?

A. Yes. There was a change in salaries to the extent of \$1,256.05.

Q. Would you explain that, please?

A. Yes, sir. The salaries expense total for the 60-week period included certain salaries that were incurred starting August 1, 1950, which is a date several weeks prior to the opening of the theatre. I have made a computation of the normal weekly salary expense of the theatre, using for this computation the actual expenses for a six-month period beginning October 1, 1950, and extending to March 31, 1951, a period which I considered a normal period.

Q. Before you go on, Mr. Youtan, I want to point to the figure to which I am referring and ask you, was there any adjustment made with respect to the item here, that is the salaries, less reimbursement?

A. I misunderstood your question there.

(Testimony of Joseph S. Youtan.)

Q. Yes, I thought you did. Would you explain the item which occurs in, I believe, all of the schedules—first, explain the item of miscellaneous income. What does it represent?

A. In which column, sir?

Q. First in the column under A, then the column under B, and then the column under C. [2264]

A. The miscellaneous income represented receipts from the use of the theatre for other than normal admissions, such as merchants advertising, special shows, occasionally the premises were rented to church organizations, and so forth.

Q. Now, when you made the adjustments that you have described, you came out with an adjusted net loss for a 60-week period for the Paradise Theatre of how much? A. Of \$34,145.79.

Q. And that was for a 60-week period, is that correct? A. Yes, sir.

Q. Now, in order to reduce that 60-week period down to a 52-week period, as involved in this case and in the light of the court's ruling, you arrived at certain figures. The first figure you arrived at was the figure Admissions Less Film Rental. What was that figure, the adjusted figure for the 52-week period? A. \$45,189.35.

Q. How did you arrive at that figure?

A. That was on an average basis by determining the average of one week of a 60-week period and multiplying that by 52 weeks.

Q. The item Candy Concession in terms of income, there was an adjustment made there?

(Testimony of Joseph S. Youtan.)

A. Yes, sir.

Q. And that adjustment was made in the same manner? [2265]

A. In the same ratio.

Q. In other words, you went from 60 weeks to 52 by taking 52/60ths? A. 52/60ths, yes.

Q. The item Miscellaneous Income, you did the same? A. Same procedure, yes, sir.

Q. This resulted in a gross income of what amount? A. For 52 weeks, \$51,576.40.

Q. Did you also arrive at a proportionate amount of expense? A. Yes, sir.

Q. And what was that? A. \$81,169.41.

Q. And that left a net loss for the Paradise Theatre for the 52-week period of how much?

A. \$29,593.01.

The Court: May I ask the witness a question?

Mr. Corinblit: Yes, sir.

The Court: Can you tell me from your figures what was the amount charged against the operation in lieu of rent? If they were paying rent for the building, they would pay so much a month, 1,000 or 1,500. Can you tell me from your figures what they actually paid in lieu of rent? [2266]

The Witness: In a building-owner occupied there are certain expenses that are incurred in lieu of rent.

There would be depreciation on the building. I have these only as to a 60-week period but we can reduce it to 52.

The Court: All right.

(Testimony of Joseph S. Youtan.)

The Witness: As to a 60-week period there was \$5005.10 of depreciation.

There was \$6579.19 of interest on the mortgage.

There was \$2018.31 of taxes on the building, and there would be another item, your Honor, which I do not have written down, but it would be a portion of the total, and that is insurance expense, the total insurance. [2267]

* * * * *

Q. (By Mr. Corinblit): Mr. Youtan, before we go on to the rest of the schedule, prior to our termination this morning, the court asked a question with respect to the matter of building charges in lieu of rent which are involved in the Paradise schedule as compared to the two other theatres, the Loyola and the Academy.

Have you made a comparison? A. I have.

Q. Would you give us that comparison, the total figure?

A. The total property charges of the Paradise Theatre [2272] for the 52-week period was \$13,488.91.

For the Loyola Theatre, \$17,552.63.

For the Academy Theatre, \$12,950.99.

Q. In setting the depreciation—I guess the depreciation item and the interest item are two substantial items in the Paradise schedule?

A. Yes.

Q. The depreciation item is depreciation on the building, is that correct? A. Yes, sir.

Q. How was that depreciation figured?

(Testimony of Joseph S. Youtan.)

A. It was figured on an estimated life of 50 years for the theatre computed on the straight line method.

Q. You figure the actual cost of the building, is that correct? A. Yes.

Q. Do you have that cost of the building? I will show you Plaintiff's Exhibit 45-P-1, which I thought was in evidence, but I guess it isn't, but I will just show it to you, without putting it in evidence, and we have no objection to it going in evidence, and I will ask you if you can tell me what the total cost of the building was.

A. The total cost of the building was \$245,-147.20.

Q. So that the depreciation figures for the building were on a straight line basis, 50 years, on the basis of that [2273] cost, is that correct?

A. That is correct.

The Court: Maybe you'd better explain to the jury what you mean by straight line. You probably understand what it is, but some of the jury may not.

The Witness: The depreciation item is apt to be technical at times. The Internal Revenue Bureau permit us to use various methods, some known as the digits method, some known as the declining balance method, and the straight line method. The straight line method, however, is the one most commonly used. By taking the cost of an item, determining how many years it will last, and dividing that cost by those years on an even basis, so that if you had an asset that cost you \$1,000 and you deter-

(Testimony of Joseph S. Youtan.)

mined that it had a 10-year life, on that straight line method, you would divide that by the 10 years, charging off \$100, one-tenth each year.

Q. (By Mr. Corinblit): Turning again to the schedule, recomputing the actual net loss, there is one item I think you ought to explain, and this requires us to go back a minute to the adjusted loss for the 60-week period. That is the item under salaries less reimbursement by Paradise Bowl. What does that item represent?

A. That represents a proration of the salaries paid by the theatre to several employees who are also rendering services at the same time to an adjoining enterprise, the [2274] Paradise Bowl, and this represents the portion of their salary that was repaid by the Paradise Bowl to the Paradise Theatre.

Q. So that the net result is that the only salaries that are charged in this operating statement to the Paradise Theatre are salaries for services performed for the Paradise Theatre.

A. Yes, sir.

Q. And no charge for services performed any place else? A. That is correct, sir.

Q. One other matter we should have here. Is there any place in this schedule with respect to recomputing the net loss of the Paradise Theatre, any salaries allowed for Mr. Alex Schreiber?

A. There are none.

Q. Do you know, was it true that there were

(Testimony of Joseph S. Youtan.)

some expense items that Mr. Schreiber did incur on behalf of the theatre?

A. He was reimbursed from time to time for nominal amounts that he expended.

Q. All right, but other than that, there are no and there were no moneys paid to him as salary charged in any of these statements, is that correct?

A. That's right, sir. [2275]

The Court: What was the amount paid the other officers of the corporation?

The Witness: Mr. Max Schreiber rendered services, and I think I can furnish you with the amount that he was paid. The expenses include the sum of \$1,961.50 to Max Schreiber.

Q. (By Mr. Corinblit): During that full year period? A. During that full year period.

The Court: For services rendered?

The Witness: For services rendered, yes, your Honor. [2276]

Q. (By Mr. Corinblit): Now, we come now to this final figure, the adjusted net loss for the 52-week period for the Paradise Theatre, and will you give us that figure again, please?

A. \$29,593.01.

Q. And that is the actual operating loss of the Paradise Theatre for that 52-week period, is that correct? A. Yes, sir.

Q. Now, have you, at my suggestion, prepared a statement showing what the net profit of the theatre would be, the Paradise Theatre would have been if it had operated on a first run basis, gross

(Testimony of Joseph S. Youtan.)

receipts of \$4500 per week with a film rental of 40 per cent and adjustments in expenses as testified to by Mr. Schreiber. A. I have.

Q. Would you simply tell us first under the 52-week basis at \$4500 per week, what would have been the total gross receipts?

A. They would have been \$234,000.

Q. And the film rental at 40 per cent would have been what amount? A. \$93,600.

Q. So, subtracting the film rental from the gross receipts, we would have what? A. \$140,400.

Q. Now, the Paradise Theatre had a candy concession and those concessions are still included in what amount?

A. The candy concession of \$5904.04 and miscellaneous income of \$2,156.68 is for the 52-week period.

Q. Which results in a gross income under these circumstances of how much?

A. \$148,460.72.

Q. All right. The total expenses which the Paradise actually incurred, not the increased expenses, but the total expenses actually incurred were how much? A. \$81,169.41.

Q. Now, Mr. Schreiber testified in the event they were playing first run policy they would have had certain increased expenses.

He testified there would be a salary increase of \$100 per week and for the year that amounts to how much? A. \$5,200.

Q. And the increase in the advertising of \$150

(Testimony of Joseph S. Youtan.)

a week or a total for the 52-week period of how much? A. \$7800.

Q. And miscellaneous increase of expenses at \$20 a week is how much? A. \$1040.

Q. And the total increased expenses are how much? A. \$14,040. [2278]

Q. So that the total expenses that the Paradise Theatre would have incurred operating on that first run policy would have been how much?

A. \$95,209.41.

Q. And that would have left a re-constructed net profit of what figure? A. \$53,251.33.

Q. What is the figure again? A. \$53,251.33.

Q. So that if the Paradise Theatre had operated on a first run basis under this set of facts, under the circumstances testified to, instead of losing \$29,593.01, it would have had a profit of \$53,251.33, so that the total amount which would have been received by Paradise instead of the loss, would have been how much? A. \$82,844.34.

Q. That is first run? A. Yes.

Q. Have you at my suggestion prepared a schedule showing what would have been the result had the Paradise Theatre, instead of operating on a first run basis, operated on a 7 day basis with gross receipts of \$3800 per week and a film rental equal to that paid by the Academy Theatre and an increase in expenses of \$1000 a year as testified to by Mr. Schreiber. Have you prepared such a schedule? [2279] A. I have.

Q. All right. Then, under those circumstances,

(Testimony of Joseph S. Youtan.)

the gross receipts—the total gross receipts of the Paradise Theatre would have been what figure?

A. \$197,600.

Q. And the film rental figured on the basis of the Academy film rental would have been what?

A. The same, \$88,191.40.

Q. And admissions less film rental?

A. \$109,408.60.

Q. And the candy concessions would remain the same under this theory? A. Yes, sir.

Q. And that figure is what? A. \$5,904.04.

Q. And miscellaneous income?

A. \$2,156.68.

Q. Giving us a total gross income of how much?

A. \$117,469.32.

Q. Now, operating on a 7 day basis, the expenses of the theatre as testified to by Mr. Schreiber, would include the present expenses, the actual expenses plus an increase of \$1000 a year. Now, the total expense again is what? A. \$81,169.41.

Q. The increased expenses for the 52-week would have [2280] been how much?

A. I used a figure of \$20 per week which amounts to \$1040.

Q. And the total expenses then would have been what figure? A. \$82,209.41.

Q. So the total reconstructed net profit on this basis would have been how much?

A. \$35,259.91.

Q. Give me the total gross again.

A. Total gross?

(Testimony of Joseph S. Youtan.)

Q. I mean the total loss.

A. The total loss was \$29,593.01.

Q. And the profit that would have been realized?

A. \$35,259.91.

Q. So that the amount that would have been received by the Paradise total is how much?

A. \$64,852.92.

Q. That is on a 7 day basis, is that correct?

A. Yes.

The Court: What was the amount on the first run?

Mr. Corinblit: Can you give the court that figure?

The Witness: Which amount?

The Court: It is on the paper there.

The Witness: The net results? [2281]

The Court: Yes.

The Witness: \$82,844.34.

Mr. Corinblit: We would like to mark for identification now the schedules prepared by Mr. Youtan.

Changes have been made in pencil and we will have them re-typed and the final figures supplied.

The Court: They may be marked for identification.

Mr. Corinblit: Thank you.

The Paradise Theatre re Computation of Actual Net Loss.

The Clerk: 68-A for identification.

(The document referred to was marked Plaintiff's Exhibit 68-A for identification.)

(Testimony of Joseph S. Youtan.)

Mr. Corinblit: The reconstructed statement of operations based upon receipts of \$4500 per week, that is first run, Exhibit 68-B.

The Clerk: 68-B for identification.

(The document referred to was marked Plaintiff's Exhibit 68-B for identification.)

Mr. Corinblit: The reconstructed statement of operations based upon the receipts of \$3800 per week as 68-C.

The Clerk: 68-C for identification.

(The document referred to was marked Plaintiff's Exhibit 68-C for identification.)

Mr. Corinblit: We will offer those exhibits in evidence. [2282]

Mr. Mitchell: There might be other testimony with respect to the Loyola and Academy. I am making the same objection.

The Court: Same ruling. They may be admitted in evidence.

The Clerk: 68-A, -B and -C.

(The exhibits referred to were received in evidence and marked as Plaintiff's Exhibits 68-A, 68-B and 68-C.)

The Court: Mr. Corinblit, will you move that paper down. I want to see your computations.

Mr. Corinblit: Yes, sir.

The Court: All right. Go ahead. I am just looking.

Q. (By Mr. Corinblit): Let me show you, Mr. Youtan, this. Is this the summary of some of the adjustments that were made? A. Yes.

(Testimony of Joseph S. Youtan.)

Q. Is this the one that you used?

A. That is correct.

Mr. Corinblit: All right. We will mark that as Plaintiff's Exhibit 68-D, the explanation of adjustments, Column C.

The Court: Same objection, same ruling. It may be admitted in evidence. [2283]

The Clerk: Exhibit 68-D.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit 68-D.)

Mr. Corinblit: You may examine.

I think, your Honor, I did neglect to offer these computations in evidence.

Mr. Mitchell: Same objection.

The Court: Same ruling. It may be admitted in evidence.

Mr. Corinblit: Thank you, your Honor.

The Clerk: Exhibit 68-E.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit 68-E.)

Cross Examination

Q. (By Mr. Westbrook): I take it you take no responsibility for the assumptions upon which you made your calculations just now, Mr. Youtan?

A. That is correct.

Q. In other words, the result depends upon the assumption you start out with, is that correct?

A. I am afraid I didn't understand your second comment.

(Testimony of Joseph S. Youtan.)

Q. I say the result depends upon the assumptions you start out with. [2284]

A. Yes, to the extent of the figures that were furnished me by counsel.

Q. That's right, to the extent of the assumed gross of \$4500 a week or the assumed gross of \$3800 a week.

A. Yes, that is correct.

Q. They determine the result in the end?

A. Yes.

Q. You were present this morning when Mr. Schreiber testified as to the actual average gross of the Paradise Theatre on 7 day pictures, were you not?

A. Yes, I was.

Q. You recall we got to the average gross of \$2,250 at that time, that is weekly gross.

A. I was present when those figures were written.

Q. Taking the actual average weekly gross, Mr. Youtan, I would like to go through the same sort of computation with you and see where we come out. What would your gross be for 52 weeks on a weekly average actual gross of \$2,250?

A. I would have to compute that.

Q. Would you do that, please?

The Court: Do you need some paper?

The Witness: No, but could I have the exhibits that were just offered in evidence.

(Clerk handing documents to witness.)

The Witness: Thank you. The admissions figure that [2285] you have there, sir, on the other work sheet?

(Testimony of Joseph S. Youtan.)

Q. (By Mr. Westbrook): Is \$2,250 per week.

A. That would produce a gross on a 52-week basis of \$117,000.

Q. Do you recall the testimony assuming a 40 per cent film rental, Mr. Youtan? A. Yes, sir.

Q. Making that same assumption here, 40 per cent, what would your film rental be?

A. \$46,800.

Mr. Corinblit: Your Honor, I object to this. What relation could 40 per cent have to a gross of 117, when the testimony is the relationship between the gross and film rental.

The Court: Well, I think he has a right to use the gross he is using. You are using an assumed gross of \$4500. He is using an actual gross of 2,250.

Mr. Corinblit: But now he is coming to a 40 per cent film rental on——

The Court: You say 40 per cent is reasonable rental to pay.

Mr. Corinblit: It is a reasonable rental, your Honor——

The Court: Objection overruled.

Mr. Corinblit: All right. I wanted to get the [2286] statement in that it is a reasonable rental based on the gross receipts, but not here.

Q. (By Mr. Westbrook): Mr. Youtan, may I have the figure again? A. Yes. \$46,800.

Q. That would give you what you have called here admissions less film rental of \$70,200, is that right? A. That is correct, sir.

(Testimony of Joseph S. Youtan.)

Q. I will extend that out over here. The expense figure you developed with all these adjustments for the Paradise Theatre was what again, Mr. Youtan?

A. The actual expenses——

The Court: For the 12-month period.

The Witness: ——for the 12-month period was \$81,169.41.

Q. (By Mr. Westbrook): Now, on the actual average gross of \$2,250 a week, I take it the theatre would have suffered a loss, using the same other assumptions that Mr. Corinblit just used.

A. Yes, except that you did omit the revenue from candy and from miscellaneous sources.

Q. Let's get to that and then we will add that, Mr. Youtan.

A. All right. Fine. There would have been a loss of \$10,969.41 at that point. [2287]

Q. That is there would have been a loss of approximately \$11,000 from operations as a theatre, putting aside the concessions and other miscellaneous income?

A. Yes, sir.

Q. Adding that miscellaneous income in, the concession business and the other miscellaneous that you have down here, there still would be a loss?

A. There would have been a loss of \$2,908.69.

Q. Just so I can complete that, this is miscellaneous income here.

A. Candy concession and——

Q. What is that figure, sir? A. \$8,060.72.

Q. In other words, approximately a \$3,000 loss?

A. Yes, sir.

(Testimony of Joseph S. Youtan.)

Q. Using the actual average gross achieved by the Paradise on 7 day pictures.

A. Using the figure you gave me, sir.

Q. You saw that developed this morning.

Mr. Westbrook: Your Honor, I would like now to offer this document which I have headed——

The Court: It may be received in evidence.

Mr. Westbrook: I believe that would be Joint Distributors V.

The Clerk: Joint Distributor Defendants' Exhibit V. [2288]

(The exhibit referred to was received in evidence and marked as Joint Distributors' Exhibit V.)

Q. (By Mr. Westbrook): Now, Mr. Youtan, you mentioned one item of expense on here that you had modified somewhat in order to make an adjustment because some of the services rendered by Mr. Max Schreiber were chargeable to other enterprises that are immediately adjacent to the theatre, is that correct? A. That's right, sir.

Q. You don't have any other expenses in your statements here with regard to the operations of the cocktail bar that Mr. Schreiber had out there.

A. Not to my knowledge.

Q. Or any other expenses that relate to the coffee shop. A. No, sir.

Q. Or relate to the bowling alley.

A. No, sir.

Q. You are familiar with the physical premises, are you not? A. Yes, sir, I am.

(Testimony of Joseph S. Youtan.)

Q. They are all adjacent to each other, is that not correct? A. That is true. [2289]

Q. Now, I would like to look with you for a moment at this subject of expenses of the Paradise Theatre.

Now, you would agree, would you not, Mr. Youtan, that from the viewpoint of management, it is quite unreasonable to treat interest on a contractual basis as an operating expense similar to the cost of film and supplies and things of that sort?

A. I believe it is a proper expense in arriving at the profit of an enterprise, yes.

Q. Are you familiar with the name W. A. Payton? A. Yes.

Q. He is recognized as an outstanding authority on accountancy, is he not? A. He is.

Q. I believe he is head of the accounting department of the Business Administration School of the University of Michigan?

A. He is back East somewhere. Either Michigan or Illinois. I presume it is Michigan.

Q. He is a recognized authority?

A. Yes, sir.

Q. Nevertheless you disagree with his proposition that it is unreasonable to treat interest or any other contractual or preferred income charge as an operating expense similar to the actual expenses of operating the business? [2290]

A. Right now that is out of the realm of accounting theory.

Q. I appreciate that.

(Testimony of Joseph S. Youtan.)

A. As a matter of practice, it is quite common to treat interest in the manner in which it has been treated in this instance.

However, I do have a high regard for Mr. Payton and I don't doubt your quotation. If that is what he says, I will recognize him as an authority.

The Court: May I ask a question. How does the Government allow you to treat interest on income tax returns?

The Witness: In any event, it is deductible. The only issue here is whether it is below a certain line or above a certain line in determining departmental profits and losses.

The Court: In determining the profit and loss in your report to the government, would you handle the interest item on an income tax return any differently?

The Witness: No. We have treated it in our statement and accounting here exactly as we do for income taxes. We have been consistent with the government's treatment.

The Court: Uncle Sam let's you get by with it?

The Witness: Not only get by with it, but he requires it to be treated that way.

Q. (By Mr. Westbrook): And he would let you get by with it if you took it off below the line?

A. That is right.

Q. It doesn't make any difference so far as Uncle Sam is concerned? A. Not at all.

Q. Would you also agree with Professor Pay-

(Testimony of Joseph S. Youtan.)

ton that especially is it important to avoid including interest or similar charges in expense in comparing the operating records of different companies?

A. I would agree with that, yes.

Q. The reason for that is, of course, interest has nothing to do with the operation of the company—it has to do with the way it is financed, doesn't it?

A. That is correct, sir.

Q. Now, on your expenses here, Mr. Youtan, you have two items of interest, haven't you?

A. I have.

Q. One of those is in the amount of \$6,579.00 on the 60-week period for mortgage interest?

A. Yes, sir.

Q. And the other is in the amount of \$2,664.37 for other interest? A. That is right.

Q. In other words, approximately \$9,300 to round it off for interest charges?

A. Yes. [2292]

Q. Now, you will agree for the purpose of comparing the operating expenses of the Paradise with that of any other theatre, you would eliminate the interest charge?

A. I will agree with that, yes.

Q. And you have studied the Academy and Loyola operating statements, have you not?

A. I have seen them.

Q. Do you have them? I guess I have them.

I would like you to examine them, if you will, and state to me whether you find any interest

(Testimony of Joseph S. Youtan.)

charges made in the operating statements of those theatres? A. I did not find any.

Q. Now, going a little bit further into this subject of interest, Mr. Youtan, I would like to talk to you for a moment about just where this interest went.

I place before you a schedule that was produced by the plaintiff in this action, and which is headed "Paradise Theatre Building Corporation Balance Sheet as of August 31, 1950," which has been marked for identification as Defendant's Exhibit I-7, and ask you if you recall that that is a schedule prepared by you some time in 1950?

A. It has my name on it. I presume it was prepared by us.

Q. Now, looking at the liability items on that balance sheet, Mr. Youtan, you notice that there is here an item of [2293] trust deed payable Massachusetts Life Insurance Company, \$175,000. Is that right? A. That is right, sir.

Q. Now, that is the item of the mortgage interest payable or paid by the Paradise that you had in your expenses?

A. That is the principal upon which interest was paid, yes.

Q. Right. Now, there is another item here which is headed "Note Payable Officer and Stockholder \$102,400."

Now, do you know who was the officer and stockholder referred to there?

(Testimony of Joseph S. Youtan.)

A. I would assume that it was Mr. Alex Schreiber and possibly Mr. or Mrs. Alex Schreiber.

Q. Do you know whether or not that was an interest bearing note?

A. I do not recall the note itself, but I am in position to testify as to the amount of interest included in our figures on those obligations.

Q. Would you give us those figures, please?

A. Yes. The interest figure on the 52-week statement included the sum of \$96.58 paid to Myrtle Schreiber.

Q. Now, do you know whether there were any deferred charges set up on interest to Mrs. Schreiber?

A. There are no other accrued or deferred interest amounts included in the expense figures used in these exhibits. [2294]

Q. Did the books of the corporation reflect any obligation to pay Mrs. Schreiber interest in the future on account of the use of this money in the past?

A. I would have to examine the books, but off hand I don't believe there was any accrued interest set up.

Q. You are not sure of that one way or the other?

A. I am not sure, but I can answer that quickly by reference to the books.

Q. Do you know what—

Mr. Corinblit: Do you want the books?

(Testimony of Joseph S. Youtan.)

Mr. Westbrook: You sit down, please.

Mr. Corinblit: Do you want the books?

Mr. Westbrook: No, I don't. Let me proceed with my examination.

Q. Do you know what the interest items are other than the mortgage interest shown on your expense items were—that is, to whom they were payable? A. Yes, sir.

Q. Will you so state?

A. The item in column D designated "Interest Mortgage of \$6,578.19" was paid entirely to the Massachusetts Mutual Life Insurance Company on the trust deed.

Q. That is the item you already referred to?

A. Yes. The other interest category showing a total of \$2,664.37 is for a 60-week period included \$509.70 to the [2295] Manufacturers National Bank of Detroit, \$1265.72 to the Q.R.S. Neon Company, the John P. Filbert Company, the company supplying the theatre seats and one or two other equipment contracts. And the sum of \$114.13 to the California Bank.

Q. All of those charges are included in the interest figure, the \$9,300 round figure?

A. Yes.

Q. Now, just while we have the balance sheet here, Mr. Youtan, you have referred to the sum of \$450,000 in this case being the amount of the investment in the Paradise Theatre Building Corporation.

(Testimony of Joseph S. Youtan.)

Will you state what the amount of the capital investment actually was?

A. From the standpoint of capital stock issued, the amount is \$25,000.

Mr. Corinblit: I object to that and move the answer be stricken on the ground it assumes a fact not in evidence. The testimony was as to the cost as distinguished from contributions to capital or in terms of loans.

The Court: Objection overruled. [2296]

Q. I didn't hear your answer above Mr. Corinblit's objection, Mr. Youtan. Will you state it again, please?

A. Insofar as capital stock is concerned, the sum of \$25,000 is shown as having been issued.

Q. That represents the stockholders' equity in the corporation, is that right, as of the time of its organization?

A. As far as actual capital investment, exclusive of loans to the corporation, is concerned.

Q. We will come to the loans in a moment.

A. Yes, sir.

Q. The loans we have already referred to indicate that the financing on this theatre was done by the extension of a loan of \$102,400 by either Mr. Schreiber or Mrs. Schreiber, you are not sure whom; the extension of a loan of \$92,000 by others unidentified on here—do you know who they are?

A. I could give you them by reference to the books, although by memory I know who they are.

(Testimony of Joseph S. Youtan.)

Q. Let's have them.

A. They are a number of relatives, friends, business associates, and I also believe there were several bank loans in there secured by collateral owned by Mr. and Mrs. Schreiber.

Q. A good part of the financing of this corporation was on instalment contracts from equipment suppliers and from the Massachusetts Life Insurance Company, isn't that right? [2297]

Mr. Corinblit: I object to that as calling for a conclusion as to "a good part."

Mr. Westbrook: We will have the figures.

The Court: Overruled.

The Witness: The sum of \$175,000 was furnished by the Massachusetts Mutual Life Insurance Company, and according to the balance sheet, \$81,466.21 represents construction and equipment contracts.

Q. (By Mr. Westbrook): With about 194,000 invested by the Schreibers; I say invested, loaned by the Schreibers to the corporation, is that correct? A. Plus a portion of the \$92,000.

Q. Yes. I add 92 and 102 and that gives me 194.

A. That's right, sir.

Q. The only risk capital in this enterprise was \$25,000 capital stock, is that right?

Mr. Corinblit: Object to that, your Honor, calling for a conclusion.

The Court: Overruled. This is an expert witness.

The Witness: There again, your Honor, we get into the realm of accounting theory.

(Testimony of Joseph S. Youtan.)

Q. (By Mr. Westbrook): Isn't capital stock ordinarily referred to as risk capital?

A. Ordinarily, but under certain circumstances loans may also be considered a risk capital depending upon the [2298] personal liability attached thereto.

Q. And that is something you are not in a position to determine one way or another?

A. I do not know to what extent the loans could have been subordinated or could have been guaranteed, and so forth.

Q. We will assume if it came to a lawsuit between Mr. Schreiber and Massachusetts Life Insurance Company, Massachusetts Life Insurance Company would win out, but putting that aside, the \$25,000 is the risk capital, is that right?

A. Yes, sir.

Q. Going back to your recomputation of the actual net loss of the Paradise Theatre, Mr. Youtan, you will notice the item of \$2,556 telephone expense. I would like you to examine the profit and loss statement for the Loyola Theatre that you have before you and tell me what the telephone expense on that statement is.

A. For a nine-month period ending September 30, 1950, the amount is \$331.53.

Q. Take a 12-month period there.

A. For a 12-month period, we have \$460.07.

Q. \$460 as against \$2556.

A. There is an exception to that, sir.

(Testimony of Joseph S. Youtan.)

Q. Yes?

A. With respect to an item at the bottom of Column D, Less Pre-opening Expense. [2299]

Q. You made some adjustment of that figure?

A. Yes, sir. Included in that figure is an elimination of \$337.

Q. \$337?

A. Yes. Just one moment, sir. Yes, of \$337.79.

Q. Now you are giving me a figure in effect of 2200 as against—what was it, 460?

A. Yes, sir.

Q. You know it to be a fact, do you not, Mr. Youtan, that the greatest part, and probably about 1700 or 1800 of that telephone item you have on here was occasioned by the fact that Mr. Schreiber was in Detroit during much of the time covered by the period you computed these expenses for?

A. That is a reasonable assumption, yes.

Q. Let's call that 1750, shall we? I take it you wouldn't regard that as a normal expense of theatre operation, would you?

A. Again it becomes a question of just how necessary it would be for Mr. Schreiber to conduct the affairs of the theatre by long-distance telephone from Detroit. I am not in a position to offer an opinion on that.

Q. If he hadn't been in Detroit, it wouldn't have been necessary, would it?

A. If he were here, there would have been fewer telephone bills. [2300]

(Testimony of Joseph S. Youtan.)

Q. Let's go down to another item here, rather, two items. You notice you have an item for travel, \$632, and an item for auto expense in the amount of \$1,684. Together, as I calculate it roughly, they make about \$2,300, right?

A. Yes, and again the adjustment at the bottom eliminates a portion of that expense.

Q. All right. Let's eliminate that.

A. There is an elimination of \$325.24 of the travel and an elimination of \$293.56 of the auto.

Q. That is about \$600, right, in round figures?

A. Yes, sir.

Q. So that would leave us with \$1,700 on auto and travel expense. A. Yes.

Q. Now, will you turn to the Loyola operating statement for a full year and tell me how much they have down for travel and auto expense?

A. I see an item here called travelling, \$312, for a 12-month period. I don't know if the item expressage would be comparable with what we have included in our auto expense.

Q. You notice on your statement you have an item for film delivery. I suggest that would be comparable to expressage.

A. Right. I see no other items that could match up with that. [2301]

Q. That is 300? A. 312.

Q. That is about \$1,400 more in your expense statement for the Paradise, is that right?

A. Approximately.

(Testimony of Joseph S. Youtan.)

Q. You are familiar with the operation of the theatre? You kept its books during this period?

A. Yes.

Q. You know Mr. Max Schreiber didn't buy and book film for the motion picture theatre, don't you?

A. I believe Mr. Lehman was rendering the services.

Q. He rendered those services and was paid for that, wasn't he? A. I believe so.

Q. I notice another interesting little item on here, Mr. Youtan. You see the item of \$670 down about the middle of the column? A. Yes, sir.

Q. What was that for?

A. That was premium paid by the corporation on a policy on the life of Alex Schreiber wherein the corporation is the beneficiary.

Q. Of course, the corporation was wholly owned by Mr. Schreiber and members of his family, wasn't it? A. That's right. [2302]

Q. Will you go down the Loyola statement and also the Academy statement and tell me if you find any similar item of expense in that operating statement?

A. There is an item of insurance, and the statement does not show a breakdown of the contents. If it is not in there, I would say there is no officers' life insurance.

Q. You have got an item of insurance, too. That ordinarily refers to casualty insurance carried on the building, and so on.

(Testimony of Joseph S. Youtan.)

A. And various other types.

Q. Yes, sir. [2303]

Q. Let us compare the insurance figures. In toto, then. You have got \$670 for officer life insurance. Is that correct? Is that on your statement?

A. Yes, sir.

Q. And then another insurance item of \$2826.

A. That is right, sir.

Q. Making a total, as I calculate it quickly, of about \$3500? A. Yes, sir.

Q. Now, what is the total insurance charged on the Loyola? A. \$1847.89.

Q. Call it \$1850, shall we? A. Yes.

Q. That is a difference of about \$1650, is that right? A. Yes.

Q. Now, you want to use the \$670——

A. I would like, however, to qualify my answer, if I may.

Q. Please do.

A. The insurance figure on our statement contains all types of insurance including compensation, workmen's compensation insurance liability, public liability, fire on the theatre, theft, and all other types of operating insurance.

The statement here of the Loyola has the item of insurance [2304] classified under the heading of "Fixed Charges" which would lead me to believe that it would not include items such as compensation insurance and normal theatre insurance expenses, which should be classified on a cost basis under house expense.

(Testimony of Joseph S. Youtan.)

Q. You mean you put some insurance——

A. No.

Q. ——in here that shouldn't be here?

A. No, no. You are making a comparison of our insurance with the insurance shown on the Loyola Theatre statement, all of which is under the heading of "Fixed Charges."

Q. Well, I am taking the item you have on here for insurance as an item of operating expense and I don't know whether it is that or not, Mr. Youtan. You can tell us. I am trying to compare that with the total shown for insurance charges on the Loyola.

A. In order to make a proper comparison, it would be necessary for us to reduce our figure of insurance to that portion which would properly be compared with the heading of "Fixed Charges" shown on the statement of the Loyola Theatre.

Q. Let us put aside the question of casualty cover. That is a little complicated.

A. And workmen's compensation.

Q. You agree that the Loyola insurance figure is \$1800 odd? A. \$1847.89. [2305]

Q. As against the \$2800 figure shown on your statement for theatre insurance?

A. That is right.

Q. Now, you have no reason to believe that that \$1800 includes any life insurance, have you?

A. No, I have no reason to believe that.

Q. And the item of life insurance is \$670?

A. Yes, sir.

Q. Now, Mr. Youtan, it is a fact, is it not, that

(Testimony of Joseph S. Youtan.)

you are not in position to certify that any single one of these items of expense shown on this re computation of actual net loss that has been presented, is a necessary expense of theatre operation?

A. That would call for an opinion that I am unable to express.

Mr. Westbrook: I have no further questions, your Honor, except that——

The Court: It may be admitted in evidence.

Mr. Westbrook: Thank you. I hadn't quite gotten to it.

The Court: This is Friday afternoon.

Mr. Johnston, do you have any questions?

Mr. Johnston: No, your Honor, I do not.

Mr. Corinblit: I have a few minutes of redirect, your Honor. We might as well take our recess at this time.

The Court: How long will your redirect examination be? [2306]

Mr. Corinblit: About 15 or 20 minutes.

The Court: Ladies and gentlemen, we are about to take another recess and again it is my duty to admonish you that you are not to discuss this case with anyone and you are not to permit anyone to discuss it with you. You are not to formulate or express any opinion as to the rights of the parties until the case has been finally submitted to you.

With that admonition, we will now be in recess until 15 minutes after 3:00 o'clock.

(Short recess.) [2307]

(Testimony of Joseph S. Youtan.)

The Court: Stipulate the jury is present in the box?

Mr. Corinblit: So stipulated, your Honor.

The Court: You may proceed.

Redirect Examination

Q. (By Mr. Corinblit): Mr. Youtan, Mr. Westbrook was making some comparisons between the expenses that were charged to the Paradise Theatre, a comparison with the Loyola Theatre. I want you to look at two items. I think Mr. Westbrook's figures total, the figures on interest, telephone, travel, auto, life insurance—what is the total?

Mr. Herscher: \$13,120.

Q. (By Mr. Corinblit): \$13,120. I want you to compare two items for me, Mr. Youtan. Do you find an item in the Loyola Theatre expense items called Administration? Look for the full year period.

A. Yes, sir.

Q. Administration. What is that item?

A. There are three components.

Q. Give me the total.

A. The total Administration was \$16,457.80.

Q. Now, will you give me the same item or equivalent item, Management and Booking, for the Paradise? [2308]

A. The amount for the 60-week period was \$2,054.94.

Q. Did you compute that to a 52-week period?

A. I have made a computation for a—just one

(Testimony of Joseph S. Youtan.)

moment—for a 42-week period, and that item was \$1,780.90.

Q. \$1,780.90. So that the overage of the Loyola over the Paradise, if my figures are right, for that one item is \$14,666.90, is that right?

A. Your arithmetic is right.

Q. What was the total of all three items referred to again?

Mr. Herscher: \$13,120.

Q. (By Mr. Corinblit): That involved four items. Now, Mr. Youtan, do you know what is included in that Administration charged to the Loyola?

A. I have no idea.

Q. You have no idea. Do you know whether or not there is included in that item a proportionate share of the income taxes paid by all of the National Theatres Corporation in the Fox chain, do you know that?

Mr. Johnston: Object to that on the ground there is no foundation laid.

The Court: Sustained.

Mr. Corinblit: All right. Mr. Johnston, will you——

The Court: How would he know about it?

Mr. Corinblit: Mr. Johnston, will you not stipulate [2309] that that item is included in that figure?

Mr. Johnston: I don't know whether it is or not. I am no accountant. I don't keep the books. I don't have any idea.

Mr. Corinblit: Do you know, Mr. Johnston, whether or not an item of maintenance of a pent-

(Testimony of Joseph S. Youtan.)

house on Washington Boulevard and Vermont is included in that item?

Mr. Johnston: Mr. Corinblit, if you want me to testify in this case, I will. I think this is highly improper to ask me questions of this nature, and you know it is.

Mr. Corinblit: Mr. Johnston, I think we have already——

Mr. Mitchell: Your Honor, aren't we arguing this case a little too soon.

The Court: You are arguing the case and this is not the proper time. I don't want to start an argument at half past three on Friday afternoon.

Mr. Corinblit: It may be, your Honor, that we can bring in the accountant.

The Court: All the purpose of this testimony is to get the figures, and when you get the figures, I will give you time to argue to the jury, and if you want to take the entire time to argue this point, it is your prerogative.

Mr. Corinblit: We have the problem that we have that statement, but we don't have that item broken down. [2310]

The Court: It is administration expense, one against the other.

Q. (By Mr. Corinblit): There is one item, Mr. Youtan. Do you have the figure for the Loyola taxes?

The Court: Talking about real estate taxes?

Mr. Corinblit: Yes.

The Witness: Yes, I have.

(Testimony of Joseph S. Youtan.)

Q. (By Mr. Corinblit): What is that figure?

A. \$8,480.30.

Q. \$8,480.30, and what tax figure do you have for the Paradise for the year?

A. For the 52-week period, \$1,749.20. [2311]

The Court: Real estate taxes.

The Witness: Yes, your Honor.

The Court: Why would the taxes of the Loyola be so much greater than the taxes of the Paradise?

Q. (By Mr. Corinblit): Will you explain those circumstances to the court?

A. Yes, I will be glad to. Why the real estate taxes on the Paradise were less. This amount represented the taxes for the Los Angeles County fiscal year covering the period July 1, 1950 to June 30, 1951, based on assessed valuations on the first Monday of March, 1950. At that time the Paradise Theatre building was in process of construction. It had not been completed and therefore the assessment was based on the land and a portion of the construction in process.

Q. That is why the figure in the Paradise statement is \$1749 as compared to the Loyola \$8,480?

A. That is right.

Q. So the total differences of these two items, being larger in the Loyola than they are in the Paradise statement, this total—would the total be reached by \$1466.90 plus \$6731.10?

A. That is right.

Q. With respect to those two items?

A. Yes. [2312]

(Testimony of Joseph S. Youtan.)

Q. Now, with respect to the item of interest that was referred to, Mr. Youtan, contained in the Paradise operating statement, some of the interest was paid on loans to third parties, is that right?

A. That is right.

Q. To your knowledge were there some of those—a considerable amount of those in which Mr. Schreiber made a personal guarantee of those loans?

The Court: This witness testified that he didn't know.

Mr. Corinblit: All right, your Honor.

The Court: He testified he didn't know.

Mr. Corinblit: All right, sir. We may have occasion to put in the actual guarantees.

I want to turn to Mr. Westbrook's Exhibit V in which the figure showed a loss in the Paradise Theatre, assuming that they grossed \$2,250 a week, which Mr. Westbrook showed was the average weekly gross on the theatre, on the pictures on the 7 day availability in the Paradise Theatre—that is to say he took the weekly grosses for the pictures in the Paradise Theatre on the 7 day availability with no other adjustments or increase, and made an average and the average was \$2250 a week. And then he asked you to figure with him what would have been the results in the Paradise Theatre under those restricted assumptions of \$2250 a week, and he showed that the Paradise Theatre, under those circumstances, would [2313] have lost \$2,908.69 under Defendant's Exhibit V.

(Testimony of Joseph S. Youtan.)

Now, what was the Paradise Theatre's actual loss under the operation? Do you have that?

A. \$29,593.01.

Q. So under Mr. Westbrook's assumption, the Paradise Theatre would have lost \$26,684.31 less than it in fact did, and there would be that much back in the Paradise Treasury under Mr. Westbrook's assumption, isn't that right?

Mr. Mitchell: I object to that as leading and suggestive and argumentative and fails to consider the fact the man wouldn't even bid.

The Court: Now, Mr. Corinblit, you are just arguing this case. You are arguing this case through the witness, and I think it is going a little bit too far.

You are entitled to bring out any facts you want to, but I don't think you are entitled to argue the case through this witness.

Mr. Corinblit: I respectfully submit, your Honor, in this case it is not argument.

The Court: I think it is.

Mr. Corinblit: All right, sir.

The Court: And I have the last guess.

Mr. Corinblit: Yes, sir.

The Court: You just go ahead.

Q. (By Mr. Corinblit): Now, finally, Mr. Youtan, I would [2314] like to place before you the schedules that were admitted in evidence. I think I have one of the originals. I will give you 68-A and I want to ask you this question first, and then we will put the figures on the board. Mr. Westbrook

(Testimony of Joseph S. Youtan.)

showed that there were some \$13,000 in expenses that he asked you about. If those \$13,000 in expenses had been eliminated from your computation, what effect would that have had upon the net computation of damage? A. None whatever.

Q. None at all? A. None at all.

Q. All right. Now, let us see if we can show that on a 52-week basis on a first run theory, the gross admissions would have been what?

A. \$234,000.

Mr. Mitchell: I object to this as being improper redirect examination. He has already had all these figures. He is just repeating the figures that he already has.

The Court: He is trying to argue the case. The figures are before the jury and before the court, and when the time comes you can argue these matters. You can put them on the board and then argue your case to the jury.

Mr. Corinblit: Let me make a point, if your Honor please. You admitted into evidence Defendants' Exhibit W. Counsel cross examined Mr. Youtan on it and I don't know what [2315] inference Mr. Westbrook was trying to bring out or what assumption the jury may have——

The Court: He hasn't told the jury as to what his inferences or assumptions were. He is waiting until the proper time to tell the jury, and then you can present to the jury your assumptions and your arguments.

Mr. Corinblit: Well, I would just like to make

(Testimony of Joseph S. Youtan.)

the offer, then, your Honor, and if your Honor wants to rule on it, we can move ahead.

I would like to take these figures and subtract them from both sides of Mr. Youtan's figures and show the results would be the same, if I may do that.

The Court: Why can't you do that at the time of your argument? The figures are before the jury. Why can't you put them on the board when you argue to the jury. They will show exactly the same as the witness says.

Mr. Corinblit: All right. That may be a faster way.

Q. Now, Mr. Youtan, Mr. Westbrook asked you a question and used the word "certification" in the question. He asked you whether you could certify to the expense figures in the books and records of the plaintiff in this case and I want to make clear that the word "certify" as you understand the term when Mr. Westbrook asked you that question, does that have a technical meaning? A. Yes.

Q. What is it?

A. The implication of the word "certification" would be that certain recognized procedures would have to be followed in order to make a statement that certain figures have been certified.

Those procedures would involve some such as the examination of vouchers, purchase orders, verification with suppliers and so forth, procedures which I was not called upon to do for the Paradise Theatre.

(Testimony of Joseph S. Youtan.)

Q. And as a matter of fact, those are extraordinary procedures as distinguished from the usual procedures? A. They are not customary.

The Court: I understood from your testimony you took the figures that the company gave you? You didn't try to verify the accuracy of those figures? You didn't go down to the box office and check to see if all the money was taken in that day reported was taken in?

The Witness: No, sir.

The Court: You just took the figures presented to you?

The Witness: That is correct. [2317]

Q. (By Mr. Corinblit): And these figures are the same figures you prepared for the income tax purposes, is that right? A. Yes, sir.

Q. And as you prepared for the profit and loss statements for the theatre? A. Yes, sir.

Q. And they are used by you in your business, isn't that right, and used by the plaintiff in the operation of their business? A. Yes, sir.

Mr. Corinblit: All right. No further questions.

Recross Examination

Q. (By Mr. Westbrook): Mr. Youtan, just so the record is clear and not confused by your inability to certify to the correctness of these figures, I take it it is correct that you have no basis on which to form an opinion as to whether any of these expenses are actually necessary in the operation of the theatre, isn't that correct?

(Testimony of Joseph S. Youtan.)

A. If you are using the word opinion as used in relation to certification, I would say I am unable to offer that type of an opinion. I am in a position to offer an opinion based on my knowledge of what is customary in the theatre business [2318] in relation to related companies, in relation to experience, to subsequent experience of this theatre, and so forth.

Q. You are not a theatre operator?

A. No, but I am familiar to a degree with the operations and the expenses of theatres.

Q. As shown by the books.

A. Books and other records I have seen from time to time.

Q. Mr. Corinblit in his argument here asked you to give him a figure for administration on the Loyola statement and you gave him a figure, didn't you?

A. Yes, sir.

Q. You don't know what that included?

A. No, sir.

Q. It includes three items on there, doesn't it, that figure?

A. Yes, sir.

Q. It includes an item for rentals?

A. That's right.

Q. It includes an item for merchandise?

A. Yes, sir.

Q. Those have nothing to do with buying and booking, have they?

A. Not for those two items, no, sir.

Q. There are a number of items on the Paradise recomputation [2319] of actual net loss that you made here that I would like to ask you about. There

(Testimony of Joseph S. Youtan.)

are legal and audit fees in the amount of \$2,236.37. I presume a good part of those were paid to you, were they not?

Mr. Corinblit: I object to that, your Honor, as being improper recross examination.

The Court: There was no question raised about that.

Mr. Westbrook: I would like to know whether those are properly charged to administration. Mr. Corinblit was making a very facetious and inadequate comparison with the total administration charge.

The Court: You can show, if you want to, what were the items of administration on the \$16,451.

Mr. Westbrook: I take it the objection is to my asking Mr. Youtan if he got paid that. I will withdraw that and ask him if that figure is not shown on the statement, \$2,236.

Mr. Corinblit: Same objection, your Honor.

The Court: You may answer.

The Witness: I would like to have the question repeated.

Q. (By Mr. Westbrook): Is there not an item of legal and audit fees on your recomputation of that net loss in the amount \$2,236.37?

A. Yes, sir. [2320]

Q. Have you got an item here of advertising and public relations. Incidentally, before I go on, you don't find any legal and audit expense on the Loyola or Academy statements, do you?

A. No, sir.

(Testimony of Joseph S. Youtan.)

Q. For all you know, that is included within the administration expense figure.

A. It is possible.

Q. It would be a proper charge to such an account, would it not? A. Yes, it might be.

Q. You have got an item here of advertising and public relations. Are you able to break that down into two parts, one for advertising and one for public relations?

A. It would be difficult at this time.

Q. You don't have any way of doing that?

A. It could be done with considerable——

Q. You are familiar with the fact that the Paradise Theatre retained a public relations consultant during the period, are you not? A. Yes, sir.

Q. And that charge is included here within the advertising figure, I take it?

A. Yes, subject to the elimination of \$1,690 of it, which is part of your \$4,784. [2321]

Q. That was just simply done on an overall basis, I mean you made an adjustment to try to get rid of certain pre-opening expenses, isn't that right? A. Yes.

Q. But you are not able to state what part of the remaining figure is attributable to this public relations man? A. No.

Q. You don't find any public relations figure on the Loyola and Academy statements, do you?

A. No, sir.

Q. Now, I would like to call your attention to another item here, stationery and office expense, in

(Testimony of Joseph S. Youtan.)

the amount of \$363. I believe that's right, isn't it?

A. Yes, sir.

Q. You don't find any such item on the Loyola and Academy statements, do you?

Mr. Corinblit: Your Honor, I will object to the question on this ground. If Mr. Johnston will bring in the auditor to show what is included in the administration expenses, we will stipulate those figures.

The Court: Overruled. I want to get rid of this witness this afternoon. Otherwise, we are going to have to call him back here on Tuesday morning.

The Witness: My figure is correct, subject to a portion that is eliminated in the \$4700 item. [2322]

Q. (By Mr. Westbrook): Let's just put down \$300 in round figures.

A. I can give you the——

Q. It isn't important, Mr. Youtan.

A. The elimination happens to be substantial in this case. It was \$225 of the \$363.

Q. That leaves you with \$125, roughly?

A. 138.

Q. The plain fact is, Mr. Youtan, you don't know whether there is any basis as an accountant for comparing administration costs with buying and booking fees, as Mr. Corinblit did a few minutes ago here?

A. I have no knowledge of the contents of the administration expense.

Mr. Westbrook: No further questions, your Honor.

(Testimony of Joseph S. Youtan.)

The Court: May this witness be excused?

Mr. Corinblit: Yes, sir.

The Court: You may be excused.

The Witness: Thank you. Wasn't I to make copies of some of these?

Mr. Corinblit: We have offered the penciled copies by Mr. Youtan. You should leave them here, Mr. Youtan, and we will check them out from the clerk and then we can make the copies.

(Witness excused.) [2323]

Mr. Corinblit: Your Honor, I think at this time we would like to make an offer of certain matters which probably ought to be done out of the presence of the jury.

The Court: Ladies and gentlemen of the jury, you are about to be excused until 10:00 o'clock on Tuesday morning. I wish you would remember the admonition of the court given to you on Fridays so far. Be careful. You are becoming very, very valuable now to the government in this case, and we don't want anything to happen to you.

Remember the admonition of the court that you should not discuss this case with anyone nor allow anyone to discuss it with you, and you should not express or formulate any opinion as to the rights of the parties until this case is finally submitted to you.

With that admonition we will now be excused until 10:00 o'clock on Tuesday morning.

Will you retire as quietly as possible, as court is still in session.

(The following proceedings were had outside of the hearing and presence of the jury:)

Mr. Corinblit: I wonder if your Honor has had an opportunity to read the memorandum.

The Court: Yes, I have read your memorandum.

Mr. Corinblit: With respect to the offer that we would like to make. [2324]

The Court: I have read your memorandum.

Mr. Corinblit: Now, in a formal way, then, embodying the terms of the offer that are included in the memorandum, we would like to make these offers in the alternative way in which they are made, that is, the offer under A, page 1, of the plaintiff's memorandum——

The Court: Just make your offer. Don't make any argument.

Mr. Corinblit: Yes, sir. In the event the court declines to accept the offer under A, on pages 1 and 2 and partially on 3, we make the offer of proof with respect to what is set forth under B, pages 3, 4, 5, and 6.

The Court: Can't your memorandum be considered as your offer?

Mr. Corinblit: I believe so, your Honor. There is no necessity for me——

The Court: There is no objection to the memorandum being considered an offer, is there?

Mr. Mitchell: I think that is proper and it will save time.

The Court: It will save time, and it is all down here.

Mr. Corinblit: Yes, sir.

The Court: Mr. Corinblit, I don't believe the Paramount case has any place in this suit at all. If you had been [2325] trying this case without a jury, I would probably have let it in because I could have brought it in and disregarded it entirely if I didn't think it applied, but inasmuch as we have a jury here, I think we are only complicating the matter by giving this phase of the case to the jury.

I feel if you would be allowed to present to the jury and argue to the jury that there had been a conspiracy in Los Angeles, that they might feel that that conspiracy would continue until there is some evidence to the contrary, and I don't know whether that is the rule or not. I think this case depends upon the facts particularly at this particular time in the Inglewood-Westchester area.

In my opinion, you have presented the facts to the jury and they are the ones to determine whether or not in their opinion there has been a conspiracy.

So I think I would be harming your case if I would allow the Paramount case to come in, because I am satisfied if I allowed the Paramount case to come in and you got a judgment, there would be an appeal—there might be an appeal anyway, as far as that goes, but they may have good reason for an appeal if I allow the Paramount case to go in. By keeping it out I avoid that problem entirely, so I am going to reject your offer of proof.

Mr. Corinblit: Now, there are one or two other matters, your Honor. It may be that I would request that I be [2326] able to finally take care of

certain matters on Tuesday. I expect to call no other witnesses. I have concluded the witnesses. The only other thing is——

The Court: You have got one witness somewhere in Europe, if you can locate him.

Mr. Corinblit: Other than Mr. Spyros Skouras. I have not had an opportunity to go through my list of exhibits to assure myself—— [2327]

The Court: I am not going to require you to rest this afternoon.

Mr. Corinblit: Thank you, sir.

The Court: You can start Tuesday morning, but not over. You can't start over. You can't bring up anything new, but if you have some loose ends that you want to tie up we will try to accommodate you.

Mr. Corinblit: Thank you, sir.

Mr. Mitchell: Your Honor, at the time he rests, except for the testimony of Mr. Skouras, I want to take a certain position. I can state it now. I don't want to state it in the presence of the jury.

I understand your Honor is going to allow counsel not to rest his case, but to hold back until Mr. Skouras shows up. Isn't that correct?

The Court: What else can I do?

Mr. Mitchell: I don't know.

The Court: Mr. Skouras was subpoenaed. He should be here.

Mr. Mitchell: I don't know. I am not criticizing anybody.

The Court: If he hadn't been subpoenaed, I probably wouldn't do it.

Mr. Mitchell: Don't take it that I am complaining. I am just stating a fact. That is the fact. [2328]

Now, under those circumstances, I take it that you want us to go ahead?

The Court: Yes, I do want you to go ahead.

Mr. Mitchell: And if we go ahead, I want to do so without prejudice to our right to make such motions when plaintiff finally does rest his case, as we might otherwise have made at the end of his resting before we are required to go forward.

The Court: You may proceed without any prejudice. I won't hold it against you because you go ahead.

Mr. Mitchell: Is that agreeable to you, Mr. Corinblit?

Mr. Corinblit: Let me say this, your Honor. I don't know my legal position on this particular point. I don't think we should be in a position, if your Honor makes the ruling, of course, we will abide by that ruling, but I will say this. If you feel I ought to stipulate——

The Court: Mr. Corinblit, you subpoenaed Mr. Skouras. He is not here. Now, I don't know what I can do.

I could require you to finish your case regardless of whether Mr. Skouras is here or not. And then possibly I might hold Mr. Skouras in contempt or you might proceed on some civil action against him. I don't know.

Mr. Corinblit: All right, your Honor.

The Court: But under the circumstances, I think

it is only just and right that if they go ahead, that they should not waive any rights they have because of this predicament [2329] over which you had no control, and they have a justifiable excuse for.

Mr. Corinblit: All right.

The Court: I think they have a justifiable excuse.

Mr. Corinblit: I agree, and I think that is a fair explanation and we will agree that we proceed without prejudice to the right of counsel to file whatever motions he desires to file at the conclusion of our case.

Mr. Mitchell: We have been using this large map of the Los Angeles metropolitan area and it is a map that we produced.

It has never been introduced into evidence. The map itself has never been introduced into evidence. I assume the map is accurate except as we called attention to the fact that the theatre named Fox Crest is really called the Fox. But there is an index of theatres on there for which no foundation has been laid and which I am advised is incorrect. But I think the map should be admitted in evidence and perhaps marked as one of our exhibits, so we can get it back some day when and if this case ever ends.

Mr. Corinblit: On that point, your Honor, I haven't looked at the index.

Mr. Mitchell: I said I don't believe the index is correct.

Mr. Corinblit: I don't know the extent to which it is not [2330] correct.

We have marked in this case another list of Fox theatres as of this date. If there is a problem as to the identification of Fox theatres, I would certainly be willing to eliminate the index if we get in this other list of Fox theatres. What I am thinking about is this, your Honor. I don't know whether it will become important but on appeal, and I am sure that is what Mr. Mitchell has in mind, on an appeal by either side we would have this map before the Court of Appeals and Mr. Mitchell would undoubtedly be up there pointing to all of these theatres and indicating to the court all the problems the distributors had with all of these theatres. That would be his argument, without regard to the question of conspiracy and collusion.

The Court: There has been no list introduced so far in evidence and there has been no testimony as to a list.

I think the list of theatres on that exhibit should be crossed out or X'ed out or the other list that is mentioned should come in. I think you gentlemen can agree as to the list of theatres.

Mr. Mitchell: I think so.

Will that have a number?

The Clerk: What is it?

Mr. Johnston: You asked me, Mr. Corinblit, the other day—— [2331]

Mr. Mitchell: I am not finished yet. It is Joint

Defendants' exhibit next in order or in evidence, your Honor.

The Court: In evidence.

The Clerk: Is that a map?

Mr. Mitchell: That is a good guess.

Mr. Westbrook: Theatre map of Los Angeles, California.

Mr. Bakaly: 1949.

The Court: Now, Mr. Johnston.

Mr. Johnston: Mr. Corinblit asked me some time ago, and I think the court ordered me to furnish him the number of theatres in the Los Angeles metropolitan area operated by Fox West Coast. Now, I have those figures which I am prepared to tender to Mr. Corinblit for a stipulation.

I have 105 Fox West Coast theatres in Los Angeles County as of July 1950.

Mr. Corinblit: I would like the opportunity of checking those figures.

Mr. Johnston: Certainly.

The Court: You can check them over between now and Tuesday morning.

Mr. Corinblit: I can't put my finger on the exhibit, but did your Honor state that the list of theatres that was otherwise offered you would permit in evidence, since we are striking out——

The Court: I didn't say I would permit it to go in. I [2332] said I thought you could stipulate they could go in. I didn't think there would be any dispute about that.

Mr. Corinblit: All right.

The Court: And if you get the list, you can paste it over that list there.

Mr. Corinblit: That is agreeable. [2333]

* * * * *

Mr. Corinblit: Thank you. Let the record show I have served upon counsel for the defendants the supplemental memoranda re the admissibility of inter-office communications.

Your Honor, we just have a few documentary matters to offer in evidence. The plaintiff will offer in evidence the cut-off cards of Paramount, cut-off cards for 1948-49, joint plaintiff and defendants' Exhibit A-1—should we give them a plaintiff's number? It will be plaintiff's next in order.

The Clerk: That would be 69.

Mr. Corinblit: We are going to provide, as a matter of fact, we have in the court room practically all the photostatic copies, and we will provide a complete photostatic copy. [2337]

Mr. Mitchell: You are including the years 1948-49, '49-50 and '50-51?

Mr. Corinblit: Yes. All the cut-off cards which have been produced are being offered in evidence.

Mr. Mitchell: I have no objection to those that are material to the period September 17, 1950, to September 17, 1951, but Exhibit A-1 applying to the period 1948-49 we object to as being immaterial to the issues.

Mr. Corinblit: Your Honor, this period now has been carved out in terms of other evidence, and this fits together with the other evidence that has gone

in. We have put in bid data starting with a reasonable period just prior to the opening of the theatre, including a reasonable period just prior to our discussions with the distributors. We have had testimony on the stand to that effect. We have now a complete set of records which is just filling in.

Mr. Mitchell is now backing away from rulings which your Honor has consistently made heretofore.

Mr. Mitchell: I am not backing away from anything. I have never said anything except that it should relate to the period when the man operated and could have been damaged.

The Court: Overruled.

The Clerk: 69-A.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit No. 69-A.) [2338]

Mr. Corinblit: The Paramount cut-off cards for 1949-50 as 69-B.

The Court: In evidence.

The Clerk: 69-B.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit No. 69-B.)

Mr. Corinblit: Paramount cut-off cards for the 1950-51 season as the Plaintiff's Exhibit 69-C.

The Court: In evidence.

The Clerk: 69-C.

(The exhibit referred to was received in evi-

dence and marked as Plaintiff's Exhibit No. 69-C.)

Mr. Corinblit: Twentieth Century-Fox cut-off cards for the year 1950, Exhibit 70-A.

The Court: In evidence.

Mr. Johnston: May I see them just a minute, counsel, please?

Mr. Corinblit: Yes. (Handing documents to Mr. Johnston.)

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit No. 70-A.)

Mr. Corinblit: Twentieth Century-Fox cut-off cards for the year 1951, 70-B.

The Court: In evidence.

The Clerk: Exhibits 70-A and 70-B. [2339]

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit 70-B.)

Mr. Corinblit: Universal cut-off cards for the year 1948-49, 71-A; Universal cut-off cards for the year 1949-50, 71-B; and Universal cut-off cards for the year 1950-51 as 71-C, your Honor.

Mr. Mitchell: May I see those, your Honor please?

Mr. Corinblit: Yes.

Mr. Mitchell: I object to the 1948-49 cut-off cards of Universal for the same reason I objected to those of Paramount.

The Court: Same ruling. In evidence.

The Clerk: 71-A, B, and C.

(The exhibits referred to were received in evi-

dence and marked as Plaintiff's Exhibits 71-A, 71-B and 71-C.) [2340]

Mr. Corinblit: Warner's cut-off card, '48-'49 season as 72-A.

Mr. Mitchell: We object to it for the same reason.

The Court: Same ruling. In evidence.

The Clerk: 72-A in evidence.

(The document referred to was marked Plaintiff's Exhibit 72-A in evidence.)

Mr. Corinblit: Warner's cut-off card for the '49-'50 season as 72-B and Warner's cut-off card for the '50-'51 season as 72-C.

The Court: In evidence.

(The documents referred to were marked Plaintiff's Exhibit 72-B and Plaintiff's Exhibit 72-C in evidence.)

Mr. Corinblit: The Metro cut-off card for the season '48-'49.

Mr. Mitchell: To which I object for the same reason.

The Court: Objection overruled.

Mr. Corinblit: As Exhibit 73-A.

The Court: Same objection and same ruling. In evidence.

(The document referred to was marked Plaintiff's Exhibit 73-A in evidence.)

Mr. Corinblit: And Metro cut-off card for the '49-'50-'51 season as Exhibit 73-B.

The Court: In evidence. [2341]

The Clerk: Exhibits 73-A and 73-B in evidence.

(The document referred to was marked Plaintiff's Exhibit 73-B in evidence.)

Mr. Corinblit: Columbia cut-off card for the '48-'49 season as Exhibit 74-A, the Columbia cut-off card for the '49-'50 season as 74-B, and Columbia cut-off card for the '50-'51 season as 74-C.

Mr. Mitchell: Object to all of them on the ground they are outside the issues of this case.

The Court: Objection overruled. In evidence.

The Clerk: 74-A, -B and -C in evidence.

(The documents referred to were marked Plaintiff's Exhibits 74-A, 74-B and 74-C in evidence.)

Mr. Corinblit: We offer in evidence as Exhibit 75-A, RKO cut-off card for the '48-'49 season; as 75-B, RKO cut-off card for the '49-'50 season, and 75-C, RKO cut-off card for the '50-'51 season.

Mr. Mitchell: Same objection.

The Court: Same ruling. In evidence.

The Clerk: 75-A, -B and -C in evidence.

(The documents referred to were marked Plaintiff's Exhibits 75-A, 75-B and 75-C in evidence.)

Mr. Corinblit: We offer in evidence United Artists cut-off card for the '48-'49 season as 76-A.

The United Artists cut-off card for the '49-'50 season as [2342] 76-B, and United cut-off card for the '50-'51 season as 76-C.

The Court: Same objection, same ruling. In evidence.

Mr. Mitchell: Thank you.

The Clerk: 76-A, -B and -C in evidence.

(The documents referred to were marked Plaintiff's Exhibits 76-A, 76-B and 76-C in evidence.)

Mr. Corinblit: There is a group of separate cut-off cards which we would like to offer as 77-A, a group of two cut-off cards from the Southside and Imperial Theatres for the '50 and '51 season.

The Court: In evidence.

The Clerk: 77-A in evidence.

(The documents referred to were marked Plaintiff's Exhibit 77-A in evidence.)

Mr. Mitchell: That should be subject to the same objection, your Honor. I assumed they were involved in this action.

The Court: What year did you say?

Mr. Corinblit: '50-'51.

Mr. Mitchell: The year is pertinent, but Columbia is not a defendant in this action.

The Court: Same objection, same ruling. In evidence.

Mr. Corinblit: Columbia cut-off card for the Southside Theatre for the year '49-'50 as 77-B.

Mr. Mitchell: Same objection.

The Court: Same ruling. In evidence.

The Clerk: Exhibit 77-B in evidence.

(The document referred to was marked Plaintiff's Exhibit 77-B in evidence.)

Mr. Corinblit: The Metro cut-off card for the La Tijera, Fox, U.A., Academy, Fifth Avenue, '49, '50 and '51 season as 77-C.

The Court: In evidence. Same objection?

(The document referred to was marked Plaintiff's Exhibit 77-C in evidence.)

Mr. Mitchell: Metro is a party to this action, and the period that is involved is within that stated in the complaint. There is no objection.

The Court: In evidence.

Mr. Corinblit: 77-D is a Warner Bros. cut-off card for the '50-'51 season for the Southside Theatre.

Mr. Mitchell: No objection.

The Court: In evidence.

The Clerk: 77-D in evidence.

(The document referred to was marked Plaintiff's Exhibit 77-D in evidence.) [2344]

Mr. Corinblit: 77-E, the Paramount cut-off card, the A-10 series, I believe, 1950-'51.

Mr. Mitchell: No objection.

The Court: In evidence.

The Clerk: Exhibit 77-E.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit No. 77-E.)

Mr. Corinblit: 77-F, the Paramount cut-off card, the A-9 series, 1949-50 season, for the Southside Theatre as 77-F.

The Court: In evidence.

The Clerk: Exhibit 77-F.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit 77-F.)

Mr. Corinblit: The plaintiff will next offer in evidence the Fox West Coast bid letters for the

first quarter of 1949 as Plaintiff's Exhibit next, 78-A.

Mr. Johnston: To which I will object, your Honor, on the ground they are immaterial, being outside the time issue involved in the lawsuit.

The Court: Overruled. In evidence.

The Clerk: Exhibit 78-A.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit 78-A.)

Mr. Corinblit: As Exhibit 78-B the Fox West Coast [2345] bid responses for the second quarter of 1949.

Mr. Johnston: Same objection.

The Court: Same objection, same ruling. In evidence.

The Clerk: Exhibit 78-B.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit 78-B.)

Mr. Corinblit: 78-C, Fox West Coast bid responses for the third quarter of 1949.

The Court: Same objection, same ruling. In evidence.

The Clerk: Exhibit 78-C.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit 78-C.)

Mr. Corinblit: As Exhibit 78-D, the Fox West Coast bid responses for the fourth quarter of 1949.

The Court: Same objection and same ruling. In evidence.

The Clerk: Exhibit 78-D.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit 78-D.)

Mr. Corinblit: Exhibit 78-E, Fox West Coast bid responses for the first quarter of 1950.

The Court: Same objection and same ruling. In evidence. [2346]

The Clerk: Exhibit 78-E.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit 78-E.)

Mr. Johnston: Mr. Corinblit, it is stipulated, I take it, that as to the other bid responses, for Fox West Coast, photostats of these documents will be substituted?

Mr. Corinblit: Yes, sir. Your Honor, there is a matter we ought to have clarified. Early in the trial, I believe we offered Exhibit 31-E, which is a list of Fox West Coast theatres as of August 1, 1950, that is a list of theatres in the chain. Your Honor rejected the offer on the ground that the parties stipulate. There is a dispute between us as to what your Honor was requiring us to stipulate to. If you will look at page 181 of the transcript, which is volume 3——

The Court: The only question was the number of theatres. The names of the theatres didn't particularly mean anything.

Mr. Corinblit: Yes, sir.

The Court: Can't you stipulate as to the number of theatres?

Mr. Johnston: I thought we had, your Honor. I was under the impression that the court's ruling was that it would be required to furnish the number of theatres operated by Fox West Coast in the Los Angeles metropolitan area, which is the [2347]

figure I gave to the court and to Mr. Corinblit Friday.

The Court: Can you stipulate as to that number?

Mr. Corinblit: I will certainly be glad to look into that matter.

Mr. Johnston: What was the number? I left my Friday's transcript in my office. 106, I think, wasn't it?

Mr. Corinblit: Something like that. What I was after was this, your Honor. In your ruling on this question, if I can read, as I read the transcript, Exhibit 31-E had to do with the total theatres in the Fox West Coast chain, and your Honor said, as I read your Honor's statement, you required a stipulation of the total number and the total number in the metropolitan area. Mr. Johnston understands your language to require only a stipulation as to the total number in the metropolitan area.

The Court: What difference does it make, Mr. Corinblit, whether there were 100 theatres or 1,000 theatres? It is a big chain.

Mr. Corinblit: Yes.

The Court: No question about it being a big chain.

Mr. Corinblit: I agree with that, but a big chain is a broad word, and it seemed to me we ought to have the total number.

The Court: I will restrict the stipulation to the number of theatres in the Los Angeles metropolitan area. [2348]

Mr. Corinblit: All right, your Honor.

Mr. Johnston: That figure has been given to the court and counsel last Friday.

The Court: For the record, how many theatres were there?

Mr. Johnston: Do you have Friday's transcript?

Mr. Corinblit: I don't have it here.

Mr. Johnston: May I borrow the court's copy?

The Court: Yes. What page was it?

Mr. Johnston: I think I can find it. If you have other things to offer, I will be looking for this.

Mr. Corinblit: I think this is just about all.

Mr. Johnston: I have it here. 105 Fox West Coast theatres in Los Angeles County, July, 1950.

Mr. Corinblit: In Los Angeles County?

Mr. Johnston: In Los Angeles County.

Mr. Corinblit: We will accept that stipulation subject to correction on that point.

There are two outstanding matters, your Honor. One is the names of theatres to the extent we can stipulate to them to be substituted for the directory. I think that is something we can stipulate to.

The Court: My understanding was that you would prepare a new list and paste it over this map.

Mr. Corinblit: Yes. [2349]

Mr. Johnston: Are the names of the theatres material, your Honor, in this proceeding? What difference does it make what they are called?

The Court: I think that the stipulation was that you present a new list of names to be pasted over the list of names on the map. You said the list of names on the map was not a correct list. I

don't know what materiality it has or whether it is material, but that was our stipulation. That was our agreement.

Mr. Corinblit: We will prepare that and submit it, your Honor.

Mr. Johnston: All right.

Mr. Corinblit: Subject to that stipulation and subject only to the testimony of Mr. Spyros Skouras, the plaintiff rests its case.

Mr. Mitchell: Your Honor, we are now proceeding on the basis of the stipulation we made on Friday just before adjournment?

The Court: That's right. Subsequent to Mr. Skouras' testimony, you can make any motion you wish to make and you will not be jeopardized because you proceed now.

Call your first witness.

Mr. Westbrook: The defendants will call Mr. Dunn.

Mr. Corinblit: Your Honor, it might be you would want to explain to the jury now that the defendants are calling [2350] witnesses and the plaintiff is cross examining.

Mr. Mitchell: They will find that out.

The Court: This is a defendants' witness. All right. Swear the witness.

CECIL L. DUNN

called as a witness herein by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: Take the stand, please, and state your name.

The Witness: Cecil, C-e-c-i-l, L. Dunn, D-u-n-n.

Direct Examination

Q. (By Mr. Westbrook): Mr. Dunn, I am not sure the jury got your name. I wonder if you would repeat it so that they might hear it.

A. It is Dunn, D-u-n-n, short, but frequently misunderstood.

Q. Will you state your occupation, please?

A. I am an economic analyst. That probably calls for a little explanation, I suppose.

I imagine everyone has heard of the business of being an economist. Economists are very much in the news in recent years. An economic analyst is one of the specialties in the general business of being an economist. An economic [2351] analyst is a man who devotes his time particularly to the practical data of business operations in contrast with what you might call a theoretic economist who spends his time more or less in speculation about how the economy works.

An economic analyst generally works for business firms and units of government to develop information that can be directly applied to the solution of business problems. That is what I do. [2352]

Q. State your educational background briefly.

(Testimony of Cecil L. Dunn.)

A. I was a graduate from the University of Southern California with a Bachelor of Art degree and I have a Master's degree and Doctor of Philosophy from the Claremont Graduate School out here in Claremont.

Q. Now, commencing, say, about 1940, would you outline briefly your employment history?

A. Well, during the depression, like everybody else, I did everything that there was to do. I taught school and all the things that people did during the depression to keep occupied.

In 1940 I returned to school at Claremont where I was employed as an instructor in economics and sociology by Pomona College and where I completed my work for the Ph.D. in the Claremont Graduate School.

After I got my doctorate in 1942, I came back to Los Angeles and went to work as an instructor in economics for Occidental College out here in Eagle Rock.

I stayed at Occidental for eight years and was promoted variously during the time I was there.

After I had been there three years, I was a full professor of economics which shows you how short they were of economists at that time. And for the last five years that I was there, I was professor of economics and chairman of the department of economics. [2353]

I discovered very early in the game of being a college teacher that it was almost impossible to support a wife and three children and a large first

(Testimony of Cecil L. Dunn.)

mortgage on what colleges were able to pay. So, fortunately, here in Los Angeles there was a great deal of employment for someone who was prepared to do the kind of work which I have described as an economic analyst.

So, very shortly after I came to Occidental I began to do a good bit of this sort of thing on the side. As a matter of fact, there was so much work of that kind available that, first, in partnership with another man, also a professor of economics, and then later as a small business which we called Cecil L. Dunn Company, Incorporated, we went into business of economic analysis on quite a scale.

It was very interesting and reasonably successful. I worked for a large number of business firms in Southern California, and for some of the principal units of Government, including the State of California.

I continued both to teach school and to conduct my own business until 1950 when I resigned from Occidental College and shortly thereafter I gave up my own business and went to work for a national firm of managing consultants called Booz, Allen and Hamilton—"Booz" is spelled without the letter "e" on it.

It is a firm which has headquarters in Chicago and I was [2354] on their staff here in Los Angeles.

For them I traveled all over the United States.

Early in my practice we, shortly after I had come to Occidental, I was employed by the Southern California Gas Company and Southern Counties Gas

(Testimony of Cecil L. Dunn.)

Company of California, which are gas distribution utilities here in Los Angeles.

In 1952 I resigned from the staff of Booz, Allen and Hamilton and went to work full time for Southern Counties Gas Company where I still am.

I am manager of the rate department. I think up the prices which we try to charge people for gas.

I am responsible for all of their relationships with the Public Utility Commission of California, which regulates our intrastate business, and for our relationships with the Federal Power Commission which regulates the prices at which we purchase gas from Texas and elsewhere. And generally act as an economic advisor to the company.

I said I went to work for them full time and I suppose that statement may be a slightly contradictory statement because I have continued to serve in a consulting capacity to some of my older clients for whom I have worked as an economic analyst, and even occasionally to do a certain amount of new work.

Part of my work as an economic analyst consisted of acting as director of research for an organization known as [2355] The Residential Research Committee of Southern California. That is an organization of banks and saving and loan associations and life insurance companies and real estate firms and building firms and others who are interested in the residential real estate and building market.

For that organization for a period of several

(Testimony of Cecil L. Dunn.)

years I prepared a regular quarterly summary of what was going on in the building and real estate market—how many houses were being built, how many were being completed. What the trend of prices was, and all of the rest of the information which would be useful for people in that industry.

At the end of 1954 I stopped doing that because I had, through that business, had learned something about the industry myself and with some of my associates I organized a small life insurance company which sells mortgage protection insurance to borrowers from savings and loan associations.

It is called Mortgage Life Insurance Company. I am the president.

The firm is only about a year and a half old, but we have mortgage protection insurance in force on about \$20,000,000 of mortgage loans outstanding in Southern California and for that matter all over the United States.

Q. Mr. Dunn, in connection with the residential research committee and also the Mortgage Life Insurance Company, was it important in the course of your duties for both of those [2356] organizations to keep in touch with the patterns of population distribution and growth of business centers and so on in Los Angeles?

A. Yes. That was one of my principal specialties, finding out what parts of the region were growing and what parts were prospectively going to grow and so on. As a matter of fact, I have the same responsibility with the gas company because

(Testimony of Cecil L. Dunn.)

we, too, have to keep up with the just unbelievable rapid growth of this area and make sure that adequate facilities are planned in advance for the new subdivisions and new tracts which are being opened all the time.

Q. Will you give the jury a little more clear idea of just what it is an economic analyst does? Will you mention specifically some of the types of studies you have had occasion to make in the course of your career?

A. Yes. I have done what is known as market analysis in which you try to decide what the characteristics of a given area are as a possible market for any commodity or even for a variety of commodities.

A firm, for example, would be interested in establishing a branch or something of that character, would be interested in a market analysis to supply them with the necessary information.

We develop the number of people in the area, the standard of living, the available income, the type of competition that [2357] exists or potentially would exist—all of the things which might influence a man's decision to start a business in a given location.

Q. You mentioned that you made a number of such market area surveys, is that correct?

A. Yes, I have.

Q. Would you mention the names of clients for whom you have made such surveys?

A. I have made market area surveys for Look

(Testimony of Cecil L. Dunn.)

Magazine, which is a national publication, for the Glendale Federal Savings and Loan Association, for the Drake Steel Supply Company here in Los Angeles.

I have made surveys for the Board of Supervisors of Kern County, for the Board of Supervisors of Orange County.

I have made surveys for the Southern California Businessmen's Association which is an organization of super market and large scale drug store operations, and for a number of similar groups of that kind.

Q. Have you done any such work for savings and loan associations?

A. Yes. I have made three studies of that character for the Glendale Federal Savings and Loan Association.

Q. Now, is there another type of study which you sometimes make which is known as a business location study or survey? [2358]

A. Yes. A business location survey is a little different from a market survey. As a matter of fact, it is almost the reverse.

In a market survey you are summing up the information about a given area so that a business firm can decide whether or not it wants to locate there.

In the case of a business locational survey they have already decided they want to do something and then it is the problem of where in a given area is the best place to locate.

(Testimony of Cecil L. Dunn.)

I have done business locational surveys of that kind also for the Glendale Federal Savings and Loan Association and for the Langendorf Bakeries and for the Dixie Cup Company, both of which I think are firms whose names are quite familiar.

Q. Now, in the case of——

A. May I mention one thing more?

Q. Excuse me.

A. On top of all this, at the present moment I am serving as an economic consultant to the Metropolitan Water District here in Southern California, and to the Attorney-General of California in the famous Colorado River suit which is being tried in the Supreme Court at this present time.

Q. Have you in the course of your work had occasion to make any studies or surveys of motion picture theatre patronage? A. Yes, I have.

Q. Will you state the approximate number?

A. I have surveyed approximately 12 to 14. I think 14 is a fair figure.

Q. Those studies, Mr. Dunn, I take it, were studies made at the request of defense counsel in various motion picture cases, is that correct?

A. Yes, they were.

Q. Would you mention some of the cases involved?

A. The first of those cases in which I was involved was the case involving the Puente Theatre out here in Puente. I made a survey of that theatre and certain competing theatres for Mr. Eugene Williams of Freston & Files.

(Testimony of Cecil L. Dunn.)

The Court: May I ask, what was the purpose of the [2360] survey. What were you trying to find out?

The Witness: What we were trying to find out there—well, there were two things we were trying to find out. First we were trying to define what might be the natural market area for the Puente Theatre.

The Court: You are talking to the jury now. Don't talk to me.

The Witness: Excuse me. Trying to find out what area the Puente Theatre could normally expect to draw from. We were trying to find out to what extent it was in competition with theatres that were located in communities around it like El Monte, Rivera, Pico, Whittier, Baldwin Park, and so on.

The Court: Do you understand the term substantial competition?

The Witness: Yes, sir.

The Court: Will you give the jury your interpretation of the term substantial competition in the theatre business now?

The Witness: I think it can probably be defined in a variety of ways depending upon the circumstances, but I think that substantial competition is anything which, shall we say, jeopardizes or hampers the profitable operation of a theatre, which bites into the profits which a theatre would earn in the absence of the competitor.

(Testimony of Cecil L. Dunn.)

The Court: One per cent, would that mean substantial [2361] competition?

The Witness: There would be circumstances in which it could be.

The Court: Less than one per cent would not be substantial?

The Witness: I wouldn't want to draw the line, sir, except to say that there are instances in which one per cent profit is the difference between breaking even and not breaking even. It is a sort of axiom, I guess, in business operations, that as long as you break even you will continue to operate rather than shut down, because when you shut down you have given up completely, and all your fixed charges, like payment of mortgage and taxes and things like that continue to run and one loses more money than if you continue to operate.

The Court: Then your premise for substantial competition is profit. If it affects the profit, then it is in substantial competition?

The Witness: That would be one of them, yes.

The Court: You mean if it affects not the income, but the profit?

The Witness: Oh, I think it would be perfectly reasonable to treat a big bite out of income as substantial competition, too, because the income very largely determines in the theatre industry the place that the individual theatre can maintain in the market. A theatre that has a big income [2362] can bid with the greater prospect of success for the pictures which it wants. It can maintain a better

(Testimony of Cecil L. Dunn.)

character of operation, offer greater attractions, to a theatre that can't make bids of that character.

The Court: There is such a thing as a big income and no profit.

The Witness: There certainly is such a thing as big income and no profit. That's right.

The Court: If you have a big income and no profit, you are in the same category, are you not, as low income and low profit?

The Witness: No, I don't think so, because there are a variety of reasons why you might have a big income and no profit.

You might have a big income and no profit because you just didn't know how to operate the theatre.

You might have a big income and no profit because for competitive purposes you were using a very substantial portion of the income to build up the character and reputation of the theatre.

You might have a substantial income and no profit on account of some unfavorable situation taxwise, or something of that character.

So while I said initially that the impact upon the profit is certainly the most evident measure of substantial [2363] competition, I think that it is equally important to emphasize the effect upon income.

The Court: Does distance have anything to do with it?

The Witness: I think distance has a great deal to do with it.

(Testimony of Cecil L. Dunn.)

The Court: In what way?

The Witness: It again depends on the circumstances, upon the nature of the community in which the theatre and the competing theatre may be located. It is perfectly possible that there could be a couple of theatres a few blocks apart and not in substantial competition with each other for a variety of reasons.

They might be playing totally different kinds of bills and deliberately seeking the patronage of one class of theatregoer as against the patronage of another class of theatregoer.

They might be situated, for example, like the Los Angeles and Hollywood downtown metropolitan theatres, most of which offer first run attractions and which draw a very substantial portion of their patronage from all the Southern California market area, and which are in competition in a sense, but in view of the range of the market which they have, there seems in most circumstances to be business for all of them. [2364]

On the other hand, a couple of theatres might be a considerable distance apart and depending upon the lines of traffic flow and the distribution of population in the area and the nature of attractions which they offer and character of the theatre's operation, and things of that kind, they could still be in substantial competition.

The Court: I take it from your testimony that there is no definition that is general. When you talk about substantial competition, you have to talk

(Testimony of Cecil L. Dunn.)

about the specific theatres. In other words, you haven't got any definition that will be substantial competition as applied to all theatres. You have got to look at each theatre or each group of theatres independently and determine whether or not they are in substantial competition, is that correct?

The Witness: I think that is true, yes.

The Court: So it is the individual theatre that is important.

The Witness: I think that's right.

The Court: All right.

Q. (By Mr. Westbrook): Now, you mentioned the Puente case, Mr. Dunn. Was there also a case known as the Markoy case in which you did some theatre surveys?

A. Yes, there was. That involved the Crown Theatre in Pasadena and whether or not the Crown Theatre was in competition with the metropolitan theatres in downtown Los Angeles [2365] and Hollywood. In connection with that case, I made a study of the market area from which the downtown Los Angeles and Paramount Theaters drew their patronage.

We studied in that case most of the principal first run theatres in both downtown Los Angeles and in Hollywood.

Q. Was there also a case known as the Baldwin case or Fanchon & Marco case?

A. Yes, there was.

Q. Did you make certain studies in connection with that case? A. Yes, I did.

(Testimony of Cecil L. Dunn.)

Q. Included among those studies, was there a study of the patronage of a theatre in the Inglewood-Westchester area known as the Academy Theatre? A. Yes, there was.

Q. At what time did you make that study?

A. The study of the patronage of the Academy Theatre was made in—toward the end of May, 1951 and the first part of June, 1951.

Q. That was in connection with the Baldwin case?

A. That was in connection with the Baldwin case, and it was at the request of the law firm of O'Melveny & Myers.

The Court: You were trying to find out in that case whether the Baldwin was in substantial competition with the Academy, were you not? [2366]

The Witness: Yes, I was.

The Court: You weren't concerned with any other theatre?

The Witness: Well, the nature of the—well, we were concerned with other theatres because we made other surveys than just those relating to the Baldwin and the Academy at that time.

The Court: As far as the Baldwin case was concerned, you were only interested in the question of whether the Academy was in substantial competition with the Baldwin?

The Witness: The Academy and others, yes, but the thing which develops, of course, when you get to looking at the market area served by the theatres in the Los Angeles metropolitan area, is that

(Testimony of Cecil L. Dunn.)

there is a sort of continuous series of overlaps, so while you have to pin down the question of substantial competition, I suppose, to whether Theatre A is in competition with Theatre B, the solution or the answer to that question depends very largely on how they are located with respect to each other, and all these other factors which I mentioned, and again how the rest of the potentially competing theatres are located.

Q. (By Mr. Westbrook): Now, Mr. Dunn, we will come back to that 1951 survey in just a moment.

A. Yes.

Mr. Corinblit: 1951? [2367]

Mr. Westbrook: 1951, counsel.

The Witness: Yes, 1951. [2368]

Q. During the intervening years from 1951 to 1956 did you have or were you employed by any motion picture company or, as far as you know, any firm of attorneys representing any motion picture companies?

A. No.

Q. Now, in 1956 were you again employed by the firm of O'Melveny & Myers?

A. Yes, I was.

Q. And that was in connection with this case?

A. Yes, it was.

Q. Now, in addition to the particular patronage survey that you made of the Academy Theatre in 1951, what additional sources of information did you use in making your further study of the situation pertaining to the Inglewood-Westchester area in 1950 and 1951, but as of 1956?

(Testimony of Cecil L. Dunn.)

A. Well, in connection with our study made for this case in the Inglewood-Westchester situation, we used a lot of information—United States Census data, specific observational studies made right on the ground—one that was made off the ground, an aerial photograph, as a matter of fact. A lot of theatre operating information relating to the playing dates and film rentals and the gross admissions and the various attractions that were played in the various theatres in the area during the time.

Most of that information, of course, derived from such [2369] theatre records such as cutoff cards and so on.

I examined newspaper advertising, both local and metropolitan newspapers and developed other information which would help to define the general competitive situation in the area.

Q. Did you take into consideration in the course of your study the survey of the residents of the Westchester area conducted by the Paradise Theatre Building Corporation in 1950?

A. Yes, sir.

Q. Have you mentioned the principal sources of information on which you relied in your study?

A. Yes, I think I have.

The Court: May I inquire, was the Paradise Theatre Building Corporation survey made available to this witness? He said he took it into consideration. Was that made available in this lawsuit for him?

Mr. Westbrook: To answer the question, your

(Testimony of Cecil L. Dunn.)

Honor, the records were made available to defense counsel after we had taken Mr. Schreiber's deposition and were made available to this witness.

The Court: Then he considered that along with the other matters.

Mr. Westbrook: That is correct.

Q. Now turning to the question of market areas in [2370] metropolitan Los Angeles.

Would you state for us, Mr. Dunn, the principal characteristics of the metropolitan area from the standpoint of markets and merchandising?

A. Well, the Los Angeles area, of course, is an extremely interesting one. It is, I guess everyone knows, unique among metropolitan areas in the way in which it has grown and spread out all over everywhere. It has, of course, the historical downtown Los Angeles which was the first important and still remains the single most important business district in the whole region.

Around that metropolitan center, the Los Angeles downtown area——

Q. I will point to these areas while you are talking about them.

A. Thank you. We have had the development of a lot of subsidiary but in many instances extremely important marketing areas from the standpoint of the entertainment industry. Of course, Hollywood is the next most important area; perhaps from the standpoint of retail trade and also significant in the entertainment industry is the Wilshire Boulevard market center, and then all around the city we have

(Testimony of Cecil L. Dunn.)

what we call the principal suburban or regional centers like——

Q. Before we go into the suburban areas, Mr. Dunn, is [2371] there a commonly accepted definition or description of the area in which you find Hollywood and Wilshire Boulevard and the downtown area located?

A. Yes, what you might call the core of the metropolitan area. The central portion of the City of Los Angeles, the Los Angeles market area as such consists of the area, oh, say from the eastern city limits of Los Angeles, taking in the downtown area, up through Highland Park, Eagle Rock, over through Hollywood and down to the eastern city limits of Beverly Hills, down to the south, oh, about as far as the northern limits of the Baldwin Hills, and back over roughly to Jefferson Boulevard. That is the most densely populated portion of the city.

Historically this is one of the oldest portions of the city. It has a sort of natural cohesiveness which makes it a pretty well defined marketing area in itself.

Q. Now, you started to mention suburban or regional centers.

A. Then there are these regional centers with which I think most of us are familiar, like Pasadena, Glendale, Beverly Hills, Inglewood, the Huntington Park area, on the southeast, and then probably Whittier and the equivalent areas to the east.

They sort of ring the city and these are important business centers, but, of course, of a somewhat

(Testimony of Cecil L. Dunn.)

different [2372] character than the downtown Hollywood area.

Q. Would you distinguish the characteristics of the suburban centers that you have spoken of from the business centers in the urban part of Los Angeles?

A. Yes. There is a sort of commonly accepted terminology that has grown up in market research and city planning conversations to describe things of this kind. We would talk about the "core of the metropolitan areas," a metropolitan center. That is a real big market. That serves immediately a half million people or more, and, of course, the principal business center for the two or three million people who now live in this whole Los Angeles business area.

In a metropolitan center like that you can find everything. It is the center of financial operations. It is the center of government. It is the center of big business, office centers—things of that kind.

Distributors of practically every kind of product are located or at least have their offices there. There is nothing in the whole range of goods and services available to us that you cannot get in a market area like that.

It, of course, has a very large development of retail trade as well in the characteristic retail store in an area like that, that tends to be a pretty broad operation, and which again undertakes to make available just about everything which the consumer would normally want. [2373]

(Testimony of Cecil L. Dunn.)

When you move out from a metropolitan center like that and get into a regional center, which is an area which has grown up or has been built to serve, oh, say, 150,000 to a quarter of a million persons, you get again practically every kind of business operation, but here you get the kind of thing which tends to be focused more directly upon the day-to-day requirements of the consumer.

You don't have the big governmental, the big financial centers and what not, but you have stores with a very comprehensive list of goods available.

You also have some wholesale distributorships which are aimed at serving the area immediately around them and so on. It is just one step down, you might say, from the sort of thing you might find in the metropolitan centers. It is a step in the direction of specific service to the consumer, the household away from the — it is a service to the household and not to industry on a large scale.

We tend to characterize a metropolitan center as such.

Q. Now, is there still a further classification or breakdown? A. Yes.

Q. Of communities within this metropolitan area?

A. Yes. Then the next step in the direction of decentralization is away from the regional center into what is frequently called the community type of center. [2374]

The regional center, as I mentioned, aims at serv-

(Testimony of Cecil L. Dunn.)

ing and does serve 150,000 to a quarter of a million people.

The community centers serve a market area of fifty to sixty thousand people.

Here again there is a further step in the direction of focusing on the needs of consumers as such.

You have department stores, but usually on a smaller scale. You have all the typical services of a retail character.

You don't have wholesale operations. You have banks and financial offices, but they are branch banks and they are aimed at helping people finance the purchase of cars and houses and are not aimed at handling large-scale transactions for big firms or for government. [2375]

It is a pretty comprehensive type of business center generally. The ordinary every day-to-day requirement of the consumer can be pretty well met there.

Again, it is a further step away from the kind of large scale operation which you have in the metropolitan center or even in a regional center.

Q. Would you name some of the representative community centers which you have been describing?

A. Yes. There are a great many of them. For example, communities like South Pasadena and Alhambra on the east.

Van Nuys and North Hollywood in the San Fernando Valley.

The beach towns characteristically, like Santa Monica, Hermosa, Redondo.

(Testimony of Cecil L. Dunn.)

In the Inglewood area, places like Westchester, for example, Hawthorne on the south side of the city, Torrance and Gardena, Compton.

There are around the regional center of Huntington Park several community centers like Lynwood, South Gate, Bell, Maywood.

We could go on. The pattern is quite distinct, and I think perhaps in Los Angeles it is just about as distinct as it is any place in the United States.

Mr. Westbrook: I think, your Honor, we are at a convenient breaking point, if you care to take the morning recess. [2376]

The Court: Ladies and gentlemen of the jury, we are about to take another recess.

Again it is my duty to admonish you you are not to discuss this case with anyone, you are not to allow anyone to discuss it with you, you are not to formulate or express any opinion as to the rights of the parties until this case has been finally submitted to you.

With that admonition, we will now recess until 10 minutes after 11:00.

(Recess.)

The Court: Stipulate the jury is present in the box?

Mr. Corinblit: So stipulated, your Honor.

Mr. Westbrook: Yes, your Honor.

The Court: You may proceed.

Q. (By Mr. Westbrook): Mr. Dunn, I take it that the description that you have given us of the broad outline of the Los Angeles metropolitan area

(Testimony of Cecil L. Dunn.)

is applicable to the 1950-51 period with which we are concerned in this case? A. Yes, it is.

Q. Now, would you take that description that you have developed and apply it to the problem of marketing in the Los Angeles metropolitan area?

A. In the course of this description I was trying to develop the general idea that as you move from the metropolitan [2377] center outward, you moved away from a concentration of markets that covered the entire region and which served the business and the people of the entire region with practically everything they could require, in the direction of first the regional and then the community centers. You are moving closer and closer toward the requirements of the ordinary consumer.

It is a sort of movement in the direction of convenience of the consumer as much as anything else, and your typical suburban or community market is one which exists very largely because it serves the immediate convenience of the people who live right around it. They are able to get to it with a minimum of time. They are easily able to see what is offered in its shops, and so on.

Generally speaking, they are quite familiar with not only the character of the businesses, but the people who operate them, and so on. It is a community operation in the strictest sense of the word.

Now, of course, you pay something for that. I think it is probably a general rule that as you move outward from the metropolitan center, the prices of uniform goods tend to move up a little bit. It costs

(Testimony of Cecil L. Dunn.)

you a little more to buy locally because you save the expense of going someplace else to buy it. The merchant has gone to the expense of bringing it to you and you pay for the convenience which is involved.

The sort of goods which are sold, I think, are characterized, not only by the fact that they are day-to-day or ordinary household necessities, but they are the sort of thing which isn't logically sold in what you might call a concentrated or an exclusive market. When you are dealing with goods which few people require or few people are willing to pay for, you have to have a great big market serving, in our case, millions of people, in order to support an establishment of that character.

Q. Would you apply those observations to the problem of marketing motion pictures?

A. Well, I think the problem of marketing motion pictures follows this pattern quite distinctly, and I think relates with some point to what I have just said about what you might call the exclusive type of store or theatre.

Characteristically, in the Los Angeles metropolitan area, we have first run, exclusive showings in the Los Angeles downtown or Hollywood areas. Then we get a progressive distribution of pictures in point of time, first with shorter availabilities in the larger suburban centers, and then successively later availabilities in the community theatres as such.

That makes sense from a variety of ways. It relates logically to this pattern of overall market or-

(Testimony of Cecil L. Dunn.)

ganization in the region, and with respect to any picture which is of a [2379] character that it can command the interest of the public on an exclusive showing basis, it makes a lot more money for the distributor to do it that way.

Mr. Corinblit: Your Honor, I ask that that portion of the answer be stricken out. I don't know whether Mr. Dunn knows how much money a distributor makes, unless we have a foundation on this point.

The Court: I might call the jury's attention to the fact that we have in litigation what is known as the expert witness. This is an expert witness. He is an expert in his field. He is qualified to give his opinion. His opinion is worth nothing more than the reasons for his opinion. You don't have to accept his opinion at all. You can listen to him for two or three days and reject his entire testimony if you want to. You may not believe him. But, however, you can accept his testimony or any part of it. It is purely his opinion. It is his opinion that this is good for the distributors. Maybe it is. I don't know.

After you get through, you will have an opinion. I don't know whether you will be able to qualify as an expert in litigation, but at least in your own mind you will have an opinion whether it is good or bad.

The objection is overruled.

Mr. Westbrook: Your Honor, I might say in the course of Mr. Dunn's testimony we will bring out

(Testimony of Cecil L. Dunn.)

amplify the [2380] facts on which he bases his opinion.

Q. Mr. Dunn, there has been mentioned in this case the fact that certain of the distributors have engaged since 1950 and 1951 to some considerable extent in the practice of having multiple first run. That would be seven, 10, perhaps even more, scattered around the metropolitan area. How does that fit in with the analysis which you have made?

The Court: May I ask this witness a question?

Mr. Westbrook: Yes, sir.

The Court: Do you understand the term first run applied to motion pictures?

The Witness: Yes, sir.

The Court: And second run?

The Witness: I think I do, yes.

The Court: 7 day availability?

The Witness: Yes, sir.

The Court: 14 day availability?

The Witness: Right.

The Court: All right.

The Witness: The nature of distribution which a distributor would use for a picture depends very largely on the character of the picture which he is going to run and the type of merchandising which he has decided on for that picture.

On a picture in which a considerable degree of public interest can be commanded on an initial single run which [2381] people could be persuaded to come from all the metropolitan area to attend an exclusive first run showing, he would in all proba-

(Testimony of Cecil L. Dunn.)

bility—he certainly would make more money by doing it that way and then stepping down through successive runs, than would otherwise be the case.

On the other hand, he might choose, for any of a number of reasons, to use the multiple first run type of distribution and to build up the total patronage by placing the picture immediately in the—making it immediately acceptable to a larger number of people.

Which practice he would follow would have to depend upon the type of distribution which was available to him, the theatres into which he could get his product, or the theatres that could be persuaded to bid for his product and, as I mentioned initially, just the character of the picture that was being exhibited.

Q. (By Mr. Westbrook): Are you able to illustrate for the jury in any way, Mr. Dunn, the difference between the exclusive first run with succeeding runs going on down the line in these various areas and the multiple first run so far as what you would consider to be the theory of the thing is concerned?

A. Yes, I think I can. May I draw pictures?

Q. Certainly.

A. If someone has a piece of chalk. [2382]

(Witness leaving stand and going to blackboard.)

Now, I hope you will excuse some of my school teaching habits, but chalk is very useful to me. Suppose we have a thousand people represented by a

(Testimony of Cecil L. Dunn.)

line about this long, 1,000 people, who are willing to pay \$2.00 to see a picture on first run.

Now, obviously, with a market as big as Los Angeles, there is going to be a lot more than a thousand, but that is the maximum round number we are using. So 1,000 people are willing to pay \$2.00. We can multiply the 1,000 people by \$2.00 and we get a total of \$2,000 the distributor would get on the first run. The people who paid the \$2.00 are the people who are willing to come downtown to go to a first run theatre.

Beyond them, let us say we have about 4,000 people who won't pay \$2.00, who won't go downtown, who can't go downtown, maybe, but who would go to one of our regional theatres, like Pasadena, Glendale, Beverly Hills and wherenot. So we have 4,000 people there and they are willing to pay \$1.00. That is 4,000 more that he gets on the second run after his first run of \$2,000 is finished.

Well, then suppose we have a lot more people who for a variety of reasons aren't willing to pay \$1.00 to see a picture and aren't willing to go to Pasadena, Beverly Hills and wherenot, but who will go to a community theatre and pay 50 [2383] cents. Let's say we have 10,000 people who would do that and would pay 50 cents. [2384]

Well, on the successive run he would get \$5000 for exhibiting his picture to them.

So, we have \$2000 here which he gets at his exclusive first run.

We have \$4000 for which he gets for his subse-

(Testimony of Cecil L. Dunn.)

quent run in the regional theatres, and we have \$5000 more which he gets on his third run by the time he is in the neighborhood or community theatres, and that obviously adds up to \$11,000.

Now, on the other hand suppose that he decided to shoot for this group all at once, the 50-cent people who only wanted to go to the neighborhood theatre. Well, that cuts off all of this. So, what does he have? He has ten thousand, four thousand and one thousand, or fifteen thousand people all of whom are willing to pay fifty cents.

Fifteen thousand people times fifty cents is \$7,500, which is \$3500 less than if he does it in this successive step type of arrangement.

There is an awful lot of technical jargon which has been used to describe this process, but I am sure you can think of other instances in which it is done.

Department stores do this sort of thing. They sell—can I gave an example?

Q. Certainly.

A. You can buy Arrow shirts, for example, which I have been known to wear, downstairs in the basement on sale at [2385] one price.

You can buy them upstairs where the women do the shopping at another price which is a little higher, and you can buy them on the ground floor where the men who need a shirt in a hurry come in and buy them for a third price. It is the same shirt but the price is still higher because it is this business of capitalizing on the exclusivity, shall we say, which you can get or the business of capitalizing on

(Testimony of Cecil L. Dunn.)

volume. You can work it both ways from the middle. It makes good sense business-wise and almost all kinds of businesses who can do it, do it.

Q. Now, Mr. Dunn, since the end of World War II, there has been a good deal of decentralization of certain types of marketing activities, has there not?

A. There certainly has been.

Q. And I suppose the department stores are the most notable example of that?

A. Yes, they are.

Q. How does that consideration of decentralization—first of all, had that progressed very far in 1950 and 1951?

A. It had gotten started, but it hadn't gone anywhere nearly as far as it has now.

Q. Now, how does that factor of decentralization in such an area as a department store activity affect your opinion with regard to the exclusivity aspects of motion [2386] picture distribution as you just mentioned?

A. Well, this business of progressive decentralization of course is occasioned by a variety of factors. One of the most important of them, among the most important among them in Southern California, of course, is the increasing spread of the community and the increasing difficulty of getting into downtown Los Angeles, particularly, even for that matter the increasing difficulty of getting into some of our important regional centers.

Then there is the fact that as these regional centers grow they are able to support larger and larger

(Testimony of Cecil L. Dunn.)

enterprises and they will ask for a wider and wider group of services. So, from the competitive standpoint it is desirable for the operator of a department store to follow his customers out into the suburbs where they are now for the most part living, and offer them there the maximum amount of service, the maximum range of goods which their requirements makes it profitable for him to carry.

This Southern California area, the Los Angeles metropolitan area, as you know, is — well, it has been called “a community on wheels.” It is an extremely fluid sort of area from the standpoint of movement of the people.

There are more automobiles per capita in Los Angeles County than any other similar unit in the United States and, of course, the world. [2387]

The accessibility of business location is becoming extremely important to merchandisers of goods of every class.

Now, nevertheless, the pattern still remains that there are many reasons why many types of merchandise have to be sought in the big metropolitan center and there are many reasons why it is most advantageous to offer—most advantageous to the seller, that is, to offer his product first in the metropolitan area and then in these successive steps that we have talked about.

Q. Is there any difference between these department store merchandising methods and motion picture merchandising?

A. Yes, there certainly is.

(Testimony of Cecil L. Dunn.)

The motion picture merchandiser is dealing with a product which is by its very nature exclusive. You make a picture. You place behind the picture the reputation of the producer. The reputation of the stars and of the director and other people who go into it and as a result of those things you create an identity which is its own. There is a picture and no other picture is a substitute for it.

The people who want to see so and so and so and so in picture X want to see picture X period.

Now, department stores on the other hand, and other kinds of merchants, are selling goods which are very largely substitutes for each other. Consideration of size and style is taken into account. But one suit of clothes is a pretty [2388] good substitute for another suit of clothes.

The sort of thing you buy at a department store is the sort of thing you buy today, tomorrow, the next day, next year and so on. It is worth that merchant's while to have a supply of those goods available to you or as close to you as he can put them all the time, because he is selling you the sort of thing which you are going to want again and again and again.

I am not trying to imply I buy a suit of clothes every day, far from it. On the other hand, the producers of motion pictures is selling something which by its very nature is exclusive. One picture is not a substitute for another.

The whole economics, I think, of the motion picture industry rests upon this factor of exclusive-

(Testimony of Cecil L. Dunn.)

ness, this factor of uniqueness—the distinctive character of one picture from another. Other merchants don't. Substitution is the rule and therefore it makes more sense for them to decentralize and to serve the aspect of convenience than it does for a merchandiser of motion pictures.

As I was trying to show the diagram, I think, makes sense economically from the standpoint of the maximum return on the investment in the picture to do it like this.

Assuming you have a picture that has—assuming that you have a picture which will command, which is unique, which is distinctive, which does command a public interest, if you [2389] have a picture that nobody ever heard of and nobody will ever hear of again, which is just something to go to and see when you want to get out of the house and not listen to the children any more, why, it is great. That is all right. You could saturate it just like you could saturate, oh, what — bread, or something of that kind.

Q. All right. Now, turning to the Inglewood-Westchester area, have you made an analysis of that area from the standpoint of the market area characteristics? A. Yes, I have.

The Court: Before you answer that question, let me ask you a question. What is the Inglewood-Westchester area? Let us define the area.

The Witness: Well, I can tell you that, too, I think.

Without getting lost in a lot of technical jargon,

(Testimony of Cecil L. Dunn.)

there is a tendency for suburban communities, even though they are a part of a great big city, to sort of emerge with separate identities. They are the product of a lot of things.

They are the product of history for one thing. They are the product of geography of the region. They are the product of the kind of community interest that has built up around the various institutions, including shops and stores and theatres and whatnot that have come into a particular community.

They are the product of such things—even such things [2390] —even such intangible things as a sort of sense of community loyalty or belonging.

All of those things tend to set apart the suburban areas of a big city as distinctive communities on their own.

Now, in the Inglewood area I think all of those factors are more or less at play. Let us begin with the history of the place. Inglewood, as you know, is probably one of the oldest suburban communities to be built up around Los Angeles.

Clear through the late '20s it existed out there almost by itself. The closest development, built up development in Los Angeles as late as the late '20s was clear over on Crenshaw and West Boulevard in the vicinity of Slauson Avenue.

It was a little community in those days known as Hyde Park. North of there on Crenshaw Boulevard there was a struggling sort of subdivision which in

(Testimony of Cecil L. Dunn.)

those days was called Angelus Mesa. There were a few scattered houses that went up out there on 54th and 52nd Streets, about three or four blocks west of what is now Crenshaw Boulevard. In those days it was called Angelus Mesa Drive and the rest from there out to the beach was farmed—it was a farm by the famous name of Baldwin Ranch.

Inglewood had an early identity of its own. Now, the second factor which I think is important here is geography. Some of it is natural geography and some of it is man-made [2391] geography.

The Baldwin Hills are still there. They still cut off the Inglewood area on the north from the Crenshaw district, particularly to the northeast from Culver City to the north and northwest. The extension of the hills running on out toward Playa Del Rey tends to, and the marsh down around Ballona Creek limits it very definitely in that direction, and on south we have the tremendous man-made obstacle, the huge Los Angeles International Airport which extends all the way from just a block or two back of the ocean front clear over to Redondo Boulevard on the extreme west side of the Inglewood city limits, and moving on in a westerly direction in about that line there is the Hollywood Park Race Track which creates a big unoccupied area. Then there is the Hawthorne Airport. There is the industrial area surrounding the Hawthorne Airport. There is the old El Segundo branch of the Pacific Electric Railroad. Most railroads imposes a pretty important barrier, a sort of a limit upon the com-

(Testimony of Cecil L. Dunn.)

munity because industrial development tends to grow up around it and so on. [2392]

Now, the Inglewood area is sort of a big triangle. It is sort of like a wedge lying on its side. It has its point out in the western limits of Westchester, say between Sepulveda and Lincoln Boulevards.

The center line of the triangle is Manchester Boulevard, which runs east and west through there.

I would say its base was probably some place in the vicinity of about Vermont Avenue.

You have a big triangle there which is about seven miles east and west along Manchester and which probably extends on its base for, oh, four or four and a half miles north and south along in the Vermont Avenue area, and most of that seems to me marketwise logically tributary to the Inglewood center as a regional center.

Now, that is not to say, of course, that there aren't important subcenters, community centers in that area.

Q. What are some of those subcenters, Mr. Dunn?

A. Well, Westchester itself is one. Then there is another one at the intersection of Manchester and Vermont, quite an important one which, unlike Westchester, which was largely a planned market area development, is just a sort of spontaneous thing there which grew up because the people were there.

Further south on Vermont Avenue, in the vicinity of Imperial, there is another one. [2393]

(Testimony of Cecil L. Dunn.)

There is quite an important subcenter at Western and Manchester, and another one somewhat less in importance at Western and Imperial.

Then, of course, along Manchester Boulevard, and to a lesser extent along Florence Avenue, there is a good bit of what we call the ribbon type business development, a continuous string of shops and stores of practically every character.

Q. How about the distribution of population through this wedge-shaped area which you have described?

A. Well, the least population, naturally, is in the Westchester area itself, which had in 1950 a population in the vicinity of 40 or 45 thousand persons.

Q. We will come to the specific populations in just a minute, Mr. Dunn.

A. Yes. As you move eastward, you get both a denser and a larger total population. The center of the area is probably pretty close to the, oh, intersection of Manchester and Crenshaw Boulevard, I should say.

Q. I should like to discuss the matter of population distribution with you for a moment, if you will. I have put on the board here an excerpt from the larger map which we have had on the easel throughout the trial. You will note on the map there are a series of colored circles. Can you tell me what those circles represent? [2394]

The Court: Are you talking about the big map or the little map?

(Testimony of Cecil L. Dunn.)

Mr. Westbrook: The little map here, your Honor.

The Court: The little map. All right.

The Witness: Yes. These circles are circles of two mile radius drawn around—let me change my glasses. I am so old and blind that I have to keep changing glasses.

These are circles of two mile radius drawn around either some of the theatres which are important in this matter or around some of the intersections which I have just talked about.

For example, the red circle is a circle of two mile radius drawn around the Paradise Theatre, which is right here.

The yellow circle up here is a circle of two mile radius drawn around the La Tijera, which at that time was right there.

The green circle is drawn around the intersection of Manchester Avenue and Market Street, which is the center of the Inglewood business district and where a lot of theatres, including the Fox Inglewood and United Artists, are clustered.

This black circle is drawn around the intersection of Manchester and Crenshaw Boulevard, the area I described as being approximately the center of this Inglewood market area as I described it, which is close to the location of the Academy and Fifth Avenue Theatres. [2395]

The blue circle down here is drawn around the intersection of Vermont and Imperial, which is the location of the Southside Theatre and one of those

(Testimony of Cecil L. Dunn.)

community business centers which I talked about, which is pretty close to the eastern limits of the area I was discussing as being the Inglewood market area.

The Court: May I ask a question?

The Witness: Yes, sir.

The Court: Why do you use the two mile radius?

Mr. Westbrook: We will come to that in just a moment, your Honor.

The Court: Am I anticipating? All right. Go ahead.

Q. (By Mr. Westbrook): Did you, Mr. Dunn, make a calculation based on the 1950 census figures of population within each of these two mile circles?

A. Yes, I did.

Q. If you will call them to me, I will undertake to mark them down on the map.

A. In the red circle——

Q. That is the Paradise?

A. Around the Paradise Theatre, we had 40,200 persons.

The Court: May I ask at what time?

The Witness: The 1950 census.

The Court: 1950 census? [2396]

The Witness: 1950 census data adjusted to the two mile circle.

Around the yellow circle, around the La Tijera Theatre, at that time there were 57,650.

The next one is the green one around the inter-

(Testimony of Cecil L. Dunn.)

section of Manchester and Market, and those theatres there. We had at that time 90,350.

The further over we go, the more we get.

Around the black circle, which was drawn around Crenshaw and Manchester, the location of the Academy Theatre, we had 101,640.

The last circle, the dark blue one, is around Vermont and Imperial, the location of the Southside, and we had 116,230.

So the remark I made a moment ago that there was the least population, as you expect, out at the point of the wedge and the most population over at the base, I think is pretty well borne out.

Mr. Westbrook: Your Honor, I would like to offer this document.

The Court: May I ask a question before you do?

Mr. Westbrook: Surely.

The Court: How do you determine the population in these circles. You say according to the census, but the census made a survey as to blocks and as to squares, and you [2397] are squaring the circle now.

The Witness: That's right.

The Court: Or circling the square. How do you figure out the population?

The Witness: Well, that is—I am glad you asked me that. The census, as his Honor has said, does make its determination on a block basis, and they sum up the blocks in what they call census tracts, and for a dollar and a half or something like that you can buy a map which shows all of the cen-

(Testimony of Cecil L. Dunn.)

sus tracts in a big city like Los Angeles, and you can get all of the population figures for each census tract, the number of people, the number of dwelling units, the number of single dwelling units, the number of multiple dwelling units, and everything else the census counts.

So we got one of those maps and drew a circle of two mile radius on the map, and then we made a list of all the census tracts which fell within the circle. Some of them, of course, were completely contained within the circle that was set up. All we had to do was add up what was in there.

But the others were only partially contained within the circle, so we had to make a census of population of people in the census tract that fell in that circle.

A few minutes ago I mentioned that we made some studies from the ground and some of them off the ground. One [2398] was an aerial photograph.

By comparing the aerial photograph with the census tract map, we found out—the aerial photograph, incidentally, was made at the same time as the census, the same time we are concerned with here.

We found out which parts of that circle were actually occupied by houses and so we made an estimate of the population of the census tracts which were contained within the circle by comparing the census tract map and the aerial photograph, and then we simply made an adjustment by taking the average number of people per dwelling unit and

(Testimony of Cecil L. Dunn.)

determined the population in the dwelling units contained within the circle, and multiplied that, and we came up with the figures here, which I think are probably accurate within a very small margin for area, certainly not 5 per cent.

Incidentally, this isn't a secret method of my own. This is used by the Los Angeles Regional Planning Commission and a lot of other responsible bodies that do this kind of thing all the time.

Q. (By Mr. Westbrook): Based on what you have told us so far about the Inglewood-Westchester area, Mr. Dunn, and the demonstration of the distribution of population which has just been made on the board here, if you were to select a theatre site in the Inglewood-Westchester area, where would you place it? [2399]

The Court: Now, just a moment. We are not interested as to where he would place it today. We are interested in 1949 and 1950.

Mr. Westbrook: I am referring to 1950 and '51, Mr. Dunn.

Mr. Corinblit: I object to that question upon the ground this witness has not been engaged in this sort of business. He hasn't invested in a theatre, in a motion picture theatre.

The Court: That is an argument you can make to the jury.

Mr. Corinblit: And I object to it.

The Court: He is giving his opinion, isn't he?

Mr. Corinblit: He would be entitled to his opinion on this particular subject if he were either a

(Testimony of Cecil L. Dunn.)

theatre man or distributor of motion pictures.

I object on the ground the question is irrelevant.

Mr. Westbrook: May I point out——

The Court: The objection is overruled, unless you want to argue me out of it. Do you want to argue? I might change my mind.

Mr. Westbrook: I was going to point out there are some very responsible businesses that paid him good money to help them on this sort of problem.

Q. Mr. Dunn, do you have an opinion in that regard? A. Yes, I do. [2400]

Q. Would you state it, please?

A. Given the choice of that area I would choose, and without regard to the fact that the Academy Theatre is now there, I would have chosen the site of the Academy Theatre.

Q. Will you state why?

A. It is at the intersection of Manchester and Crenshaw Boulevards, which, I have concluded, is just about the center of that market area in the Inglewood area. It is extremely well located from the standpoint of accessibility and this point of fluidity—this ease of getting at it which I mentioned a few moments ago. That is a major factor.

It is on Manchester Boulevard, which is a big, wide artery running east and west. And it is also on Crenshaw Boulevard, which is almost an equally good traffic artery running north and south.

It is sufficiently far outside the more or less congested Inglewood downtown area so that parking is no problem. Parking is more readily available.

(Testimony of Cecil L. Dunn.)

There is less competition for parking from other establishments.

In short, it is a good location.

Q. Why do you choose a site easterly of downtown Inglewood?

A. Primarily because the bulk of the population in the market area is on that side of the downtown area.

The Court: Didn't I understand you to say that your figures showed that the greatest population was in the circle [2401] surrounding the Southside Theatre?

The Witness: The farther over to the east we get the more, the greater the population in a given circle, yes. But the Southside Theatre is pretty close to what we treated here a moment ago as the extreme east side of this population area.

The Court: But the location of a motion picture theatre is fundamentally determined on population, its patronage and that comes from population.

The Witness: People who go to the theatre, but where it has to have two things; it has to have the people and it has to have a method by which the people can get there.

The Court: Now, the Southside Theatre is also on two good boulevards.

The Witness: It sure is, it sure is, but Mr. Westbrook asked me where in this area I would put one.

The Court: That is right, but I am asking you why would you select the Academy Theatre site in

(Testimony of Cecil L. Dunn.)

favor of the Southside Theatre site when the Southside Theatre has more population surrounding it.

The Witness: The Southside has more population in that circle, yes, but now we have got to consider the relationship of the Southside to the rest of the metropolitan area of which it is a part.

Moving easterly from the Southside along Imperial Boulevard [2402] we begin to come into other subsidiary communities—Compton, and moving on over in the direction of South Gate, Lynwood, which are essentially tributary to the Huntington Park regional center, and there you are running up against the same kind of competition that you would get if you moved in, for instance, closer back toward—excuse me—if you moved closer back toward Inglewood.

The Southside is a good location beyond any doubt.

The Court: When you selected the Academy site as a place you would put a theatre——

The Witness: Right.

The Court: ——did you give any consideration to the theatres that are already established there?

The Witness: Yes, yes.

The Court: That is, you gave consideration to the theatres already within the area, within that circle.

The Witness: Yes.

The Court: And you still say that that would be in your opinion the better site.

The Witness: I sure would, given, of course, the

(Testimony of Cecil L. Dunn.)

ability to set up and operate the kind of theatre which I thought would give the rest of the boys the sort of competition which they needed to keep us all healthy.

Q. (By Mr. Westbrook): His Honor asked you a moment ago if there was any special significance attached to the two-mile [2403] circle other than being a convenient device for measuring the density of the population around the theatres.

Is there any special significance to the two-mile radius?

A. Yes, there is. There is the bulk of a patronage of a suburban or community theatre on subsequent runs, say, 14-20-day runs tend to be concentrated in about two miles around a theatre.

The Court: Why do you say two miles?

The Witness: It is just, sir, it is that is a product of a great many forces. [2404]

For one thing it is the result of the way in which these communities in the Los Angeles basin are made up. Each of them seems to have a sort of a natural, an immediately available local market which is about that big.

The Court: Well, do you want the court to understand and the jury to understand that two miles is a limit?

The Witness: No, sir.

The Court: Of substantial competition?

The Witness: No, sir, I do not. The only thing I said here was that with respect to theatres playing 14 and 21 day availability.

(Testimony of Cecil L. Dunn.)

The Court: And 7?

The Witness: No, not 7. 7 draws farther.

The Court: 14.

Mr. Westbrook: We will come to that, your Honor. We have an actual survey of the patronage of the Academy Theatre on the 7 day availability which is the next subject.

The Court: Go ahead.

The Witness: The only thing I am saying, sir, is that given 14 and 21 day availability, the patronage of a theatre, and I mean by that the bulk of the patronage, say 80, 85 per cent, maybe a little more, tends to come from the area within about two miles of the theatre, give or take a few blocks, give or take a few per cent.

Well, one of the good things about economics is it is not [2405] an exact science.

Mr. Westbrook: Your Honor, if I may, I would like now to offer this document as defendants' next in order.

The Court: It may be received in evidence.

Mr. Westbrook: Y-1.

The Clerk: Y-1 in evidence.

(The document referred to was marked Defendants' Exhibit Y-1, and received in evidence.)

The Court: Mr. Westbrook is looking at the clock, but I want to ask this witness another question or two.

One of the important problems in this case was also in the Baldwin case—and by the way, with ref-

(Testimony of Cecil L. Dunn.)

erence to the other cases that you testified you made a survey for, you also appeared as a witness, did you not?

The Witness: Only, sir, in the Baldwin case.

The Court: You didn't testify in the other cases?

The Witness: No, they were apparently resolved out of court.

The Court: You did testify in the Baldwin case?

The Witness: Yes, sir.

The Court: One of the important matters here is that this jury is going to have to determine the question of substantial competition.

I pointed out to the jury at the beginning of the case that probably everybody would have a different definition of [2406] substantial competition, and now you have given us an entirely different definition this morning. We haven't had your definition before as to what substantial competition means.

Now, you have used here an arbitrary two-mile circle, but you said a moment ago or earlier this morning that your idea of substantial competition depended upon profit and then you qualified your answer and said revenue, income.

The Witness: And then I mentioned space and then I mentioned the pattern of distribution of theatres in the area.

The Court: But considering——

The Witness: I had four different things.

The Court: Let us consider the Paradise Theatre. You have drawn a circle here of two miles.

(Testimony of Cecil L. Dunn.)

The Witness: Yep,—excuse me, yes, sir.

The Court: Now, is it your opinion that the patronage that would go to the Paradise Theatre outside of the two-mile limit would be sufficient to make it either a profitable theatre or an unprofitable theatre?

The Witness: Under certain circumstances, it certainly could be because at least ten per cent of its total patronage is probably from outside that limit.

The Court: You are just guessing now, aren't you?

The Witness: No, I am not.

Mr. Westbrook: Your Honor, we will come to the actual [2407] figures on the Academy, as soon as I can get the next map on the board, which I apprehend will not be until after lunch. But maybe your Honor would be satisfied now for the moment, at least, if Mr. Dunn were to state to you what radius he found the Academy Theatre drawing from on this 7 day availability that you are talking about.

The Witness: The bulk of the patronage of the Academy Theatre playing 7 day policy, was drawn within a radius of about 4.6 miles, four miles.

Mr. Corinblit: Four miles?

The Witness: The maximum—not the maximum spread, but the bulk of patronage and again when I say “bulk of patronage” I mean 80 to 95 per cent which covers probably the bulk of your expenses, was drawn from within a circle of about four miles.

(Testimony of Cecil L. Dunn.)

The Court: And the 14 day availability is two miles—14 and 21 day availabilities?

The Witness: Well, two or two and a half. It tends to get smaller the later the run. The later the run, the smaller the circle.

The Court: Well, Mr. Westbrook, you said I was asking for this information. I am not asking these questions for the information of the court. I am asking them for the information of the jury.

Mr. Westbrook: Yes. [2408]

The Court: I have had a lot of experience on this question and I may resolve this question in my own mind as to whether or not it is substantial competition from my past experience, but this jury hasn't had the benefit of that experience.

Mr. Westbrook: Your Honor is quite right and it is the jury I am interested in and not the court. It is the jury I am trying to get the information to.

I think your questions have been very helpful and we will develop the matter of the 7 day availability and the patronage area later.

The Court: It is 12:00 o'clock and I am quite sure the jury is finding this a very interesting topic. It is a new field of endeavor. You are getting information that I don't think you could get anywhere else even if you tried to pay for it. You are being educated at the expense of the Government.

The Witness: The witness is having a good time, too.

The Court: The only requirement is that you remember the admonition of the court heretofore

(Testimony of Cecil L. Dunn.)

given and keep an open and free mind. Don't come to any conclusion until you have heard all of the case.

We are about to take another recess and again it is my duty to admonish you not to discuss this case with anyone. You are not to permit anyone to discuss it with you and you are [2409] not to formulate or express any opinion as to the rights of the parties until it has been finally submitted to you.

With that admonition we will now recess until 2:00 o'clock this afternoon.

(Whereupon at 12:00 o'clock noon, a recess was taken until 2:00 o'clock p.m. of the same date.) [2410]

Tuesday, August 7, 1956, 2:00 p.m.

The Court: Stipulate the jury is present in the box?

Mr. Corinblit: So stipulated, your Honor.

Mr. Mitchell: Yes.

The Court: You may proceed.

CECIL L. DUNN

the witness on the stand at the time of the recess, having been heretofore duly sworn, was examined and testified further as follows:

Direct Examination—(Continued)

Q. (By Mr. Westbrook): Mr. Dunn, I mentioned this morning that in 1951 you had conducted an actual patronage survey of the Academy Theatre. Would you describe the procedure followed in making such a survey?

(Testimony of Cecil L. Dunn.)

A. Yes. An actual patronage survey is a case of what I think we can call market research work. The objective is to find out where the people who patronize a given store or theatre come from, in order that you may be able to define the market area upon which that establishment can draw.

A survey of this kind involved, of course, approaching the patrons of the theatre, in this case, and asking them [2411] where they came from or where their homes are, so to that extent it is an interviewing sort of survey, but it is not a case of an interviewing survey that we think of when we think of a public opinion survey, which I suppose is much more widely known.

In the case of the public opinion survey you are asking the respondent to answer a hypothetical question, what would you do or what do you think about something, or what is your opinion of.

In the case of market research, like a theatre survey, you are asking him for a matter of fact, where do you come from, or where do you live. You are not asking him, what would you do under certain circumstances, or what he thinks. You are simply asking him to tell you something which is a matter of predetermined matter of fact, and when you count it, you are counting something which is considerably more tangible, I think, than when you are summing up the answers to opinion surveys. That is not, of course, to say that opinion surveys aren't very useful, but that is a different kind of technique than is employed here.

(Testimony of Cecil L. Dunn.)

Now, that is exactly what we did in the case of the survey in the Academy Theatre. We employed a group of interviewers who had worked in each case at least two years with an established market research firm here in Southern California, and who consequently had had experience in interviewing of this [2412] character.

We stationed them in the lobby of the theatre and asked them to approach the patrons as they entered the theatre, telling them what they were doing, they were trying to determine the area from which the theatre drew its patronage, and simply asking them if they wouldn't give their home address. They were not asked for any identification. They weren't asked for their opinion on any matter. They were given to understand, if they raised the question, that the information would not be related to them in any way and would not be used for any other purpose, for solicitation or mailings, or anything of that kind, but simply where did you come from to attend the theatre this afternoon or tonight.

In that way, we secured the home addresses of the great bulk of the patronage of the Academy Theatre on two different days. We used a week day, Thursday, the 31st of May, and a week-end day, Saturday, the 2nd of June, in order to eliminate any bias that might come from the patronage which the theatre draws on a week-end day as opposed to the patronage which it draws on a week day.

Having obtained all of those items, and we got

certainly 90 or 95 per cent of the total number of people who were there—the only reason that I recall for not getting 100 per cent is because people came in in groups and you could not ask them all—this isn't the sort of thing people refuse [2413] to answer, not being asked anything which is in any way personal. We took those addresses and distributed them on a map like that map which is now on the board, in order to show on the map, with the use of a series of dots, the distribution of the theatre's patronage.

Then having done that, we analyzed it in a variety of ways to see how that influenced the market which the Academy Theatre enjoyed.

All told, I think that we interviewed something in excess of 1600 persons—1683, as a matter of fact, and that, as I have said, was certainly close to 90 or 95 per cent of the total patronage on those two days.

Q. Did you find any difference in the distribution of patronage on the two days?

A. Yes, we did. There was substantially more patronage on the week-end day than there was on the week day.

Q. Did that appear to affect the geographic spread in any way?

A. No, it didn't. We started with the week day attendance and began spotting them on the map, and very soon a pattern began to emerge. Things like this have a tendency to be remarkably uniform, simply because, as I was saying this morning, so

(Testimony of Cecil L. Dunn.)

many market areas have a distinctive characteristic anyway.

We started with the week day patronage, which, as I [2414] said, was smaller than the week-end day, and by the time we had spotted a couple of hundred of those addresses, why, the pattern was pretty well complete.

Then we went on with the rest of the week-day and on through the week-end day and all that happened was that we just began filling in the spaces. The pattern stayed just about the same. [2415]

Q. Now, what is the effect of a sample like this on two days in indicating the usual pattern of patronage for a theatre or any other business establishment?

A. I think it indicates it quite precisely. I mean this is my idea of a good way of showing the area from which the patronage is drawn.

In using two days you get away from any error that might come from a single day by using a week day against a weekend day. You eliminate that bias, and in view of the fact that—well, in all of these studies of this character which I have done, in view of the fact that very early in this process you see a pretty distinct pattern develop and then the rest of the information just sort of fills out the pattern.

I am satisfied that this is a good method of representing the market area of a theatre. And, again, I am not alone in this opinion. I mean, this is a standard technique. Everybody who does this sort of thing does it this way, not only with re-

(Testimony of Cecil L. Dunn.)

spect to theatres, but you do it with all kinds of economic information which might influence the location of a store, the location of a new traffic artery, the development of parking space and all of the usual economic questions which are an issue.

Q. Now, would you identify the particular two days that were involved on this survey?

A. I think I indicated it was Thursday, [2416] the 31st of May, 1951, and Saturday, the 2nd of June.

Q. 1951? A. 1951, right.

Q. Now, the program at that time at the Academy Theatre was what?

A. The Lemondrop Kid.

Q. Do you recall the second feature?

A. Fighting Coast Guard.

Q. That was on a 7 day availability?

A. Yes, it was.

The Court: The same picture on both days, the same program on both days?

The Witness: Yes, sir.

Q. (By Mr. Westbrook): Was there any other theatre in the Inglewood-Westchester area playing the program at the same time?

A. The Southside was playing The Lemondrop Kid the same days.

Q. Now, the map to which you referred, Mr. Dunn, is the map we have here on the board, is that right? A. That is right, yes.

Q. Now, you will note that there are some col-

(Testimony of Cecil L. Dunn.)

ored areas on this map. The Academy Theatre is located here, where this little triangular indication is, is that correct? A. That is right. [2417]

Q. You will note that there are some colored areas in the vicinity of the Academy Theatre at Manchester and Crenshaw and some additional colored areas in the vicinity of downtown Inglewood.

Will you state the significance of that coloration?

A. Yes. Each of those little squares, some of which are painted yellow and some of which are painted green, there is a square a half mile in size—that is to say an area of a quarter of a square mile. We used those because in those areas the concentration of dots was so great that to put on the red dots would have just left—you couldn't have distinguished one from the other. It would have been a solid mass of red dots, so each of the yellow squares there contain one and a half per cent of the total number of responses—the total number of addresses which we got, and the other ones, the green ones contain from two to four per cent, that is to say an average of three per cent of the total number.

That is simply a matter of convenience to avoid just covering the map with so many dots that you couldn't see the difference between them. But, of course, that indicates the great concentration of the patronage. I mean there is a very substantial fraction of the patronage in there.

Q. What is the percentage of patronage in the colored squares that you mentioned? [2418]

(Testimony of Cecil L. Dunn.)

A. I think it is about 27 per cent, if I am not mistaken.

Q. 27.1 on the map? A. 27.1, thank you.

Mr. Corinblit: In all of the colored squares?

The Witness: In all of the colored squares.

Mr. Corinblit: Green and yellow.

The Witness: The balance, of course, is represented by those single dots scattered all around the map. Each one of those red dots indicates one address.

Q. (By Mr. Westbrook): I note some that are scattered up here in the Westwood area and in Santa Monica and so on. Each of those represent one person, is that correct? A. That is right.

Q. And then where there is the greater intensity of red dots closer to the Inglewood-Westchester area, each dot represents one person attending the theatre? A. One person, right.

Q. Now, you mentioned this morning the fact that the survey showed that the bulk of the patronage—I believe you said 85 to 90 per cent of the attendance at the Academy Theatre, came from within a four mile radius. I wonder if you would step down to the map and point that out at the present time.

A. Yes. There is a scale down here on the bottom of [2419] the map. This is three miles here and the Academy is right here.

Four miles would take us up approximately here, and then the distance down here and then over to

(Testimony of Cecil L. Dunn.)

here and if you can think of a circle drawn there, you can see the great bulk of the dots except those scattered ones up in here, and if you look at it you will see a few scattered ones clear over in here—they would fall right in here.

The Court: Would that four mile radius include the Paradise Theatre?

Mr. Corinblit: No, sir.

Mr. Westbrook: As the crow flies, your Honor, within about a half mile of the Paradise Theatre, more or less.

The Court: I was asking the witness and not counsel. The witness is the only one sworn.

Mr. Corinblit: There is a stipulation on that point. That is the only reason I mentioned it.

The Court: It doesn't include the Paradise Theatre?

The Witness: It falls, as Mr. Westbrook has said, about a half mile as the crow flies. It is four and a half miles if you follow the various courses of Manchester Avenue which wanders around.

Mr. Corinblit: I take it there is no change and that we still have the same stipulation?

Mr. Westbrook: The distance, following the various [2420] turnings, going north a half mile and coming back a quarter of a mile and then another quarter of a mile is about 4.5 miles.

The Court: When this stipulation was entered into, I didn't examine as to whether we were talking about as a crow flies or as a pigeon flies or a

(Testimony of Cecil L. Dunn.)

turkey walks. I took it as meaning four and a half miles.

Mr. Westbrook: Counsel intended it to be the shortest driving distance between the two theatres using the normal route.

Mr. Corinblit: That is correct.

The Court: By automobile.

Mr. Corinblit: Yes.

Mr. Westbrook: There was nothing said about how the crow flies.

The Court: All right.

Q. (By Mr. Westbrook): Now, Mr. Dunn, with specific reference to the westerly portions of this distribution of patronage, did you make at my request a computation of the actual number of patrons attending the Academy Theatre but living beyond the mid-point the Paradise and the Academy?

A. Yes, I did.

Q. Now, just to point that out on the map, Mr. Dunn, there is a red line drawn here. Will you state what the red line symbolizes? [2421]

A. That is Oak Street and a prolongation of Oak Street.

It represents the mid-point of the four and a half-mile distance between the two theatres.

Q. Just because we have this confusion on crow flight versus driving distance, will you tell us what that is? A. That is driving distance.

Q. Would you state along what route?

A. From the Paradise Theatre up La Tijera to

(Testimony of Cecil L. Dunn.)

Manchester and over Manchester to the Academy Theatre, following Manchester as it is displaced in there.

Q. And the mid-point you state is at the intersection of Oak and Manchester, is that right?

A. That is right.

Q. What is the difference between the Academy and the red line, the mid-point?

A. Two and a quarter miles.

Q. Now, will you state the percentage of the patronage of the Academy who came from the area west of the mid-point between the Paradise and the Academy?

A. Out of 1683 represented by the survey, there were 243 west of the mid-point. That is 14.4 per cent of the patronage came from west of the mid-point of the distance between the two theatres.

Q. I am marking on the map here, Mr. Dunn, 14.4 per cent.

Did you also make a computation of the total number of patrons coming from the area west of downtown Inglewood? A. Yes, I did.

Q. I note on the map we have a green line. Will you indicate what that symbolizes?

A. That is Market Street and its prolongation. It is the main street of the Inglewood business district, the center of downtown Inglewood for all practical purposes.

Q. I note that we have a concentration of patronage lying westerly of downtown Inglewood. Would

(Testimony of Cecil L. Dunn.)

you state the approximate percentage that lies within that group of yellow squares of patronage of the Academy?

A. There are four squares in there?

Q. Yes. A. There is 6 per cent in there.

The Court: You mean between the main street of Inglewood to the red line is 6 per cent, is that right?

The Witness: No, sir, not quite. In this mark of four yellow squares, there is 6 per cent.

The Court: In the four yellow squares?

The Witness: Yes. Actually, between Market Street and the mid-point——

The Court: Talk to the jury. [2423]

The Witness: I'm sorry.

Q. (By Mr. Westbrook): We will come to that in just a minute, Mr. Dunn. A. All right.

Q. With reference to the prolongation of Market Street here north and south, I take it you did make a count of the actual number of patrons of the Academy coming from the area west of the green line or, in other words, west of downtown Inglewood? A. Right.

Q. Do you have that number, sir?

A. 441.

Q. Translating that in terms of percentage, what does it come out to? A. 26 per cent.

The Court: Is that from the green line to the red line, or from the green line west?

The Witness: That is from the green line west.

(Testimony of Cecil L. Dunn.)

The Court: That includes the other percentage then.

The Witness: Yes. So between the green line and the red line, there is what? 11.6 per cent.

Q. (By Mr. Westbrook): Are there any factors present in this Inglewood area, and I call your attention particularly to the westerly portion of the Academy patronage, which would [2424] indicate to you that people living in that area would tend to go one way or the other to the theatre?

A. Well, in general, the Inglewood business district as such, as defined by a line like Market Street and the business establishments that are grouped around there, probably tends to limit the way that people move.

Q. In what way, sir?

A. I would think there would be a disposition to avoid going through the Inglewood business district, if you could get the same thing by not doing so.

Q. Does the configuration of streets and movement of traffic have anything to do with that?

A. Yes, it does. Manchester Boulevard, of course, is the principal east and west artery there and lends itself very readily to the flow of a considerable volume of traffic.

Market Street at that point is not such an important artery. It is by no means as significant as a method of north and south movement as is Crenshaw a little farther to the east.

(Testimony of Cecil L. Dunn.)

Q. What about such streets as La Tijera and Florence, what influence do they have?

A. They, too, have a considerable effect upon the flow of traffic.

Q. In what way?

A. La Tijera, for example, provides essentially a means [2425] of communication north and south and north of Inglewood in a generally northeasterly direction, and Florence Avenue is similar in its effect to Manchester, but perhaps—well, as a matter of actual fact, somewhat less useful, less significant than is Manchester, because Florence is somewhat choked as it goes through the Inglewood business district.

There is sort of an interesting situation existing there on Manchester, which in part, which, in fact, accounts for that separation of those two blocks which you can see here on the map. This is the area we were talking about this morning, the Inglewood Park Cemetery here, the country club, and then Hollywood Park Race Track in there, an area which is for all practical purposes not populated, and almost as though these two blocks, as though they could be ignored, and these two blocks could be drawn together, because there is no business frontage along Manchester Boulevard here. It is a great wide boulevard with little, if any, parking, and people can move along quite rapidly. It forms quite a corridor there and expedites traffic. It is al-

(Testimony of Cecil L. Dunn.)

most as though you could treat these two as being drawn together.

Q. Based upon the distribution of patronage shown by the map which you have prepared, do you have an opinion as to the effect of having the Academy and the Paradise play a program day and date on the 7 day availability, using the same motion picture? [2426]

A. Yes, I do.

Q. Will you state that opinion, please?

Mr. Corinblit: Your Honor, I object to this question as being without foundation. There is a tremendous gap in the testimony of this witness between a description of the areas and moving to the effect of day and date. I don't see any foundation here of this witness' knowledge as to what happens when pictures play day and date. There has been no experiment, although there were plenty of opportunities, as to when the Academy and Paradise play day and date, at least during this period.

Mr. Westbrook: There were none such.

The Court: May I ask the witness a question?

Based on your study of this area and the report that has been made relative to patronage, do you have any opinion as to whether or not the Academy Theatre and the Paradise Theatre were in substantial competition in 1951?

The Witness: Yes, I do.

The Court: Now, is there an objection to that?

Mr. Corinblit: Having in mind, your Honor, the standards the witness stated about substantial com-

(Testimony of Cecil L. Dunn.)

petition, I think there are possible standards to work with, but he has given the standards, and I would object on the ground it is too vague and indefinite.

The Court: Objection overruled. I just wanted to [2427] get it in the record, if you have an objection.

What is your opinion?

A. I have a very firm opinion on that. I think with the Academy Theatre and the Paradise Theatre playing day and date——

Mr. Corinblit: Just a minute. I'm sorry.

The Court: That wasn't the question.

The Witness: All right. Strike that part. I think they are in substantial competition with each other, were in 1950 in substantial competition.

The Court: As far as substantial competition is concerned, as I understand your definition or one of your definitions, it is based upon the patronage it draws into the theatre.

The Witness: That's right.

The Court: It wouldn't make any difference, would it, as to whether they played the same picture or some other picture?

The Witness: Oh, yes, it would.

The Court: On substantial competition?

The Witness: Surely.

The Court: Suppose you had one picture in the Paradise, and a picture in the Academy, and they are playing the same days, but they are not play-

(Testimony of Cecil L. Dunn.)

ing the same picture. Would there be substantial competition? [2428]

The Witness: There would be less competition than if the two theatres were playing the same picture.

The Court: Do I understand now from your testimony that substantial competition in your mind only means that situation that exists when the theatres play the same picture?

The Witness: No, sir. No, I do not. The only thing I have said on that point is that the competition is considerably enhanced. It is tougher, more substantial, if you will when they are playing the same picture than when they are playing different pictures. That is inherent in the economics of the theatre market.

The Court: All I asked you was whether or not there was substantial competition, not in playing the same picture, but playing all pictures.

The Witness: Yes, I would say they were.

The Court: That is your opinion.

The Witness: That's right.

The Court: But it is also your opinion that if they play the same picture——

The Witness: Then it gets tougher.

The Court: There is more substantial competition?

The Witness: Yes, sir. I think that would be very damaging.

(Testimony of Cecil L. Dunn.)

The Court: Now you may go back to your question, if you can remember it. [2429]

Mr. Westbrook: Thank you, your Honor.

Q. Now, Mr. Dunn, you have referred to the difference between playing different pictures and competing with the same program with each other on the 7 day availability. A. That's right.

Q. I will direct your attention to the latter of those two situations, that is, where you have a day and date exhibition at the Paradise here in Westchester and at the Academy over at the intersection of Crenshaw and Manchester, the same program on the 7 day availability. Now, what, sir, is your opinion with regard to the extent of the competition between those two theatres for patronage?

Mr. Corinblit: Just a minute. I object to that question.

The Court: Just a minute. I have to object to the question. I think you are entitled to ask the witness if there is substantial competition, but you say what is the extent of the competition. Are we going to get into percentages?

Mr. Westbrook: I think so, your Honor. We are prepared to.

The Court: All right, but I think you should——

Mr. Westbrook: You had Mr. Schreiber on the stand and he speculated as to what percentage constituted substantial competition, and we are prepared to deal with those [2430] percentages.

The Court: I tried to find out from this witness

(Testimony of Cecil L. Dunn.)

what was his standard and what percentage he used, and his definition is if it took patronage from one theatre to 1 per cent, it is substantial, because the 1 per cent might mean the difference between profit and loss.

Mr. Westbrook: I don't think we have to argue about 1 per cent in this case, your Honor. I think if we proceed you will find that the potential loss of patronage from day and date exhibition is so significant that nobody would be prepared to disregard it.

The Court: May I ask this witness a question?

Mr. Westbrook: Certainly.

The Court: Did you make a survey relative to the two theatres, the Paradise Theatre—did you make a survey when the pictures were playing day and date, to determine where the patrons were coming from?

The Witness: There weren't any.

The Court: I beg your pardon?

The Witness: There were no such cases.

The Court: You mean there was no time when they played day and date?

The Witness: Right, but I have done the best I can by the comparison of what I am convinced are comparable programs and by other measures to satisfy myself that there is [2431] certainly substantial competition between the theatres.

The Court: Mr. Westbrook, you commented a little while ago that I allowed Mr. Schreiber to tes-

(Testimony of Cecil L. Dunn.)

tify. You remember I allowed him to testify because he was the owner, and the owner can testify as to value when a by-stander can't, without laying a foundation.

Mr. Westbrook: I will agree with your Honor that a by-stander couldn't, that is to say, I couldn't come in and testify, because I am not an expert in this business, but you have on the stand a man who has made this precise type of evaluation for many different business organizations, and he certainly is qualified as an expert.

The Court: I have allowed him to testify and give his opinion, and that's all he can do, is give his opinion and the reason for his opinion. I have allowed him to give his opinion to the question of whether or not there was substantial competition. Now, he says there was no survey relative to what the percentage was between the two theatres if they played day and date. It is pure speculation. It was speculation as far as Mr. Schreiber was concerned, but I allowed him to testify because he was the owner.

Mr. Westbrook: Your Honor, we have the actual patronage of the theatre, but I think we may get to the same result if I ask Mr. Dunn the reason for his opinion that the theatres were in substantial competition. [2432]

The Court: All right. You can do that.

Q. (By Mr. Westbrook): Mr. Dunn, will you please state.

A. Yes. The basic reason why I think that the

(Testimony of Cecil L. Dunn.)

theatres were in substantial competition is the way in which they are—first, the way in which they are related to each other geographically. I am convinced from my studies of theatre patronage that theatres playing on a 7 day availability draw the bulk of their patronage from a circle of approximately four miles in radius surrounding the location of the theatre.

I am further convinced that as the availability—as we get to subsequent runs, the availability runs to 14 and then 21 days, that the size of the circle diminishes somewhat. It is four miles on 7 day availability. It is two to two and a half miles, maybe a little larger, on 14.

By the time we get down to 21, it is the vicinity of two miles or so.

In view of that distribution of patronage, where those circles would overlap, that the two theatres playing the same attraction would be in direct competition for at least that portion of the patronage which fell in the overlapping area of the two circles. [2433]

Q. Now, will you describe that area with reference to the Paradise and the Academy, please?

A. Yes. The four-mile circle which we drew with respect to the Academy Theatre—I will show you—I will indicate it again. That four-mile circle with respect to the Academy Theatre——

Q. Will you move around on this side, Mr. Dunn?

A. I am sorry. It would be this one which I in-

(Testimony of Cecil L. Dunn.)

dicated a moment ago and certainly included the great bulk of the Academy patronage.

Now, if we take a four-mile circle and describe it around the location of the Paradise Theatre right here, it falls over here almost to the actual location of the Academy Theatre and out here it falls approximately a half mile out into the ocean where there is no significant patronage, of course.

So remembering that if this end of the triangle was the lightly populated area and remembering that the Paradise would have to draw from a four-mile circle, part of the four-mile circle from which it could draw, because it is the part where the people are, is the part from here over to here. In other words, on a 7 day availability between the two theatres, certainly 40 per cent of the patronage of the Academy and 75 per cent of the patronage of the Paradise would be subject to headon competition. [2434]

Now, on subsequent runs as the size of the circles diminish, the bite would be less severe, but it would still be a bite.

And in view of the fact that even under existing circumstances there were no day and date runs 14.4 per cent of the patronage lies west of the mid-point and 26 per cent of it west of the Inglewood business district which pretty well, I think, defines who goes this way and who might go this way.

There is certainly substantial competition there even under those circumstances.

(Testimony of Cecil L. Dunn.)

The Court: May I ask the witness a question.

Mr. Westbrook: You certainly may, your Honor.

The Court: Assuming that where these two circles overlap each other——

The Witness: Yes, sir.

The Court: If the two theatres are playing the same pictures the people who live in that overlapping area can go either way—they can either go over to the right or to the left.

The Witness: Right.

The Court: According to their personal desires. Maybe it is a question of transportation. Maybe it is a question of parking. Maybe they are going to go for some other purpose but they go either way.

The Witness: They go one way or the other.

The Court: Assuming that they didn't play the same picture—they were playing different pictures, would the people who are in that overlapping area go to the right to see a particular picture or to the left to see a particular picture. Do they go to see a particular picture or do they go to the theatre?

The Witness: I think the whole economics of the motion picture business shows that while it is pitched upon the proposition that people go to see a particular picture, because if they don't the whole theory of the exclusive nature of the picture would break down and in point of fact it doesn't break down. It stands up.

The Court: Then if they had an A picture, a number 1 picture at the Paradise——

(Testimony of Cecil L. Dunn.)

The Witness: Yes.

The Court: ——and a turkey or a dog over at the other theatre——

The Witness: Or both.

The Court: ——the people would go to the Paradise Theatre?

The Witness: A larger number of them would go to the Paradise Theatre.

The Court: And under those conditions, that is, if one theatre had an outstanding picture and the other theatre had a very poor picture, then there wouldn't be, in your opinion,—there wasn't any substantial competition? [2436]

The Witness: No. What I said was that as the coincidence of runs got closer and closer together, the competition got tougher and tougher.

The Court: But earlier you said, maybe inadvertently, that there was no competition if they didn't play the same pictures.

The Witness: No, sir, no, sir.

The Court: If they didn't——

The Witness: No, no, no. I didn't say that and if I did say that, that was certainly inadvertent.

The Court: There is competition regardless?

The Witness: There is competition regardless, but the closer they get to day and date runs, the closer the competition becomes and on day and date runs it would certainly be—well, it would certainly be in the area of substantiality. In fact, it would be real tough.

(Testimony of Cecil L. Dunn.)

The Court: If it was day and date?

The Witness: If it isn't day and date, it isn't quite as rugged as I was trying to draw the circles——

The Court: Just a minute. If it wasn't day and date, then the question of whether or not they would go to the right to the Academy or to the left to the Paradise would depend largely upon the picture that was playing in the respective theatres?

The Witness: Right, right. [2437]

Q. (By Mr. Westbrook): Now, Mr. Dunn, in the course of your study of this problem out in the Inglewood-Westchester area, did you have occasion to examine those instances where the Paradise Theatre did in fact play day and date with other theatres in the area? A. Yes, I did.

Q. Now, in making that study will you state what different availabilities you included?

A. 7, 14 and 21 days.

Q. Now, was there any reason for including all three of those availabilities in this one particular study?

A. Yes. In order to get it to cover the range of day and date exhibitions between—when the Paradise played day and date with other theatres in this area, we had to run that clear through that range of availabilities.

Q. Now, the purpose of the study was to compare the results achieved at the Paradise with the results achieved at another theatre on the same availability with the same top feature?

(Testimony of Cecil L. Dunn.)

A. That is correct.

Q. Now, in that connection how many total pictures did you examine—total programs?

A. A total of 29 and—a total of 30 different pictures.

Q. And in any of these instances, did you have examples [2438] where exactly the same program played at the Paradise and other theatres?

A. Yes. There were two such instances in which—I mean there were two theatres which played identical programs—one theatre played identical programs on three different occasions with the Paradise and the other two on different occasions with the Paradise.

Q. Now, I would like to go to the board again with you, Mr. Dunn, and go down through a tabulation of the results of that comparison.

I am going to put at the top of the sheet “Gross Admissions Comparison.”

A. As a matter of fact, Mr. Westbrook, there are three different theatres which on occasion played identical bills with the Paradise.

Q. I think perhaps we can point that out as you go along, Mr. Dunn.

The Court: Just a little while ago you said that you made a study of these theatres. Did you make a study relative to interviewing the patrons?

The Witness: No, sir, this is something different.

The Court: This is a different kind of study?

The Witness: That is correct, but this is still based upon recorded facts.

(Testimony of Cecil L. Dunn.)

The Court: But you didn't interview the people [2439] as they came into the theatre?

The Witness: No. This one doesn't involve interviewing the people.

Mr. Westbrook: There is one other that did.

The Witness: Yes, but it is not involved in this particular subject which we have under discussion at the moment.

Q. (By Mr. Westbrook): Where you did interview the patrons? A. Yes.

Q. Now, referring back to the study we are talking about on the gross comparisons, I will indicate here. And then the number of programs here and then a column headed "Paradise" and a column headed "Per Cent" and another column headed "Other theatres," and out here we will have the name of the other theatre.

Now, referring to the Fifth Avenue and the Paradise. How many occasions during the year's period that we are talking about here in '50 and '51 did the Paradise and the Fifth Avenue play day and date? A. Twice.

Q. Now, one of those instances was——

A. An identical bill.

Q. So we will put that down separately and I will put an asterisk out here and that will mean it is identical bill. [2440]

What was the gross admission prices at the Paradise on the first week's exhibition of that identical double bill? A. \$1326.

(Testimony of Cecil L. Dunn.)

Q. And what was the gross admissions at the other theatre, in this case the Fifth Avenue?

A. \$2318.

The Court: May I inquire if they charged the same price or do you know?

The Witness: I don't know.

Mr. Corinblit: Your Honor, you might also want to inquire as to whether they covered the same dates completely.

You won't argue that there were more playing days at the Fifth Avenue than at the Paradise? We have gone through this before.

Mr. Westbrook: That is correct. The schedule I handed you shows two days extra playing time. You may point that out when you get up here.

The Court: As far as the time is concerned, you say they played the program—the same program. Did they play the same program the same number of days?

Mr. Westbrook: There was two different play days at the Fifth Avenue as Mr. Corinblit pointed out,—two days more at the Fifth Avenue.

Q. Now, what was the percentage of the Paradise gross admissions on that exhibition to the Fifth Avenue gross [2441] admission prices, Mr. Dunn?

A. 57.

The Court: Now, will you explain what you mean by that? The percentage of what was 57 per cent?

The Witness: \$1326 is 57 per cent of the \$2318.

Q. (By Mr. Westbrook): In other words, the

(Testimony of Cecil L. Dunn.)

Paradise grossed 50 per cent of what the Fifth Avenue did? A. Right.

Q. And Mr. Corinblit pointed out there were two extra play days at the Fifth Avenue.

A. That is right.

Q. Now, the other picture that you mentioned playing at the Fifth Avenue had a different second feature, is that right? A. That is true, yes.

Q. And what was the gross on that picture at the Paradise? A. \$1890.

Q. And what was the gross at the Fifth Avenue?

A. \$2760.

Q. Now, in that instance I believe it is correct, is it not, that there were also two extra playing days at the Fifth Avenue, but it played the picture—it began two days later than the Paradise?

A. That is correct, yes. [2442]

Q. And what was the percentage of the Paradise admissions on that program?

A. 68 per cent.

Q. Now, going on, did you find any instances where the Fox-Inglewood and the Paradise played day and date?

A. Yes, there were five occasions when at least the top feature played day and date at the Fox-Inglewood and the Paradise.

Q. Now, on what availabilities did those programs play?

A. Four of them were 14 days and one 21 days.

Q. Just to indicate this, Mr. Dunn, I am going to go back here and put in parentheses, "14" to in-

(Testimony of Cecil L. Dunn.)

indicate a 14 day availability on the first program at the Fifth Avenue and 14 to indicate that availability on the second program at the Fifth Avenue.

Is that correct? A. That is correct.

Q. And this one you say is 14?

A. 14 in four instances, and 21 in the fifth.

Q. I will put a little "4" above there.

Now, in that instance, how did you make a comparison between the two theatres?

A. In this instance I simply summed up here the total gross admissions of the first week of the program.

Q. And then average it? [2443]

A. Averaged it, right.

Q. Will you give me the average weekly gross on the programs at the Paradise?

A. Average weekly gross at the Paradise in the five instances playing day and date with Fox, Paradise was \$1520, and the Fox \$2651.

Q. And what was the percentage of the Paradise?

A. 58 per cent. The Paradise gross was 58 per cent of the Fox.

The Court: Don't you want to put down the name of the theatre, Mr. Westbrook?

Mr. Westbrook: Yes, I am sorry. Thank you.

Mr. Corinblit: You will agree with me, counsel, that in the case of two pictures there was an extra day on which the other theatre played, is that right?

Mr. Westbrook: I think, counsel, you will find in the case of the first picture that there is an error

(Testimony of Cecil L. Dunn.)

in the work sheet and that Sunset Boulevard played identically at the Fox and Paradise.

Mr. Corinblit: Then this exhibit is not correct?

Mr. Westbrook: I think that is an error. We will come to that.

Mr. Corinblit: On the picture Rocky Mountain there was one extra day for the Fox?

Mr. Westbrook: That is correct, one of the five pictures there was one extra day for the Fox. [2444]

Q. (By Mr. Westbrook): Now, with regard to the Imperial Theatre, Mr. Dunn, did you find any instances where the Imperial and Paradise played day and date?

A. Yes. There were three instances there. Two of them were 7 day availabilities and the third was 21. In the case of one of the two 7 day pictures, it was concurrently playing at the same time on a 7 day availability at the Southside.

Q. One of the two, you say?

A. One of the two, yes, one of the two 7 day pictures.

Q. That was Born Yesterday?

A. Yes, sir. I followed the same practice here and have summed up and averaged the first week's grosses in each instance, and here the Paradise had an average of 2,179, and the Imperial 1,556.

Q. Now, in this instance the Paradise outgrossed the Imperial?

A. Right, 138 per cent, that is to say, 38 per cent more.

Q. Just to complete the record with regard

(Testimony of Cecil L. Dunn.)

to playing time, according to the summary, is there any instance where the Paradise played fewer days than the Imperial?

A. No. As a matter of fact, in one instance here the Imperial played fewer days than the Paradise.

Q. That is true in two instances, is it not?

A. I am looking at my—yes, it is. One picture [2445] started, one of the 7 day pictures started two days later at the Imperial, and the 21 day picture ended three days before at the Imperial.

Q. Did you find any instance where the Paradise and the La Tijera played a picture day and date?

A. Yes, there is one such instance. A picture played on a 7 day availability at both the Paradise and the La Tijera, and at the same time at the Southside and the Imperial.

Q. That was again Born Yesterday?

A. That was Born Yesterday. Everybody had it.

Q. What was the gross in the Paradise?

A. The gross in the Paradise on that occasion was 3,718, and at the La Tijera 3,941, and the Paradise gross was 95 per cent of the La Tijera.

Q. Now, with reference to the Rio Theatre.

A. Yes. Here there are nine different occasions on which the Paradise and the Rio played day and date, one 7 day availability, one 14 day, and the other seven were 21.

Q. Were what, sir?

(Testimony of Cecil L. Dunn.)

A. Were 21 day availability.

Q. Were any of those programs identical programs?

A. Three of them were identical bills, the 7 day bill, the 14 day bill, and one of the 21 day bills were identical.

Q. On those three identical programs, what was the average gross in the Paradise? [2446]

A. On those three identical programs, the average gross in the Paradise was 1,355, and at the Rio 1,515. In other words, the Paradise grossed 89 per cent of the gross at the Rio.

Q. There were 6 additional programs?

A. There were six 21 day programs, yes.

Q. Where the Rio and the Paradise played day and date with the top feature?

A. That's right, and one of them was an identical bill. In that case the——

Q. We have already eliminated the one with the identical. A. So we have. Excuse me.

Q. We have six other programs.

A. Six other programs.

Q. On the 21 day availability.

A. Right. The average gross in the Paradise was 1,868.

Q. And the average gross at the Rio?

A. 1,611. The Paradise was 22 per cent more in this instance, 122 per cent.

Q. I am putting it down 122 per cent.

A. Yes, which means 22 per cent more.

(Testimony of Cecil L. Dunn.)

The Court: Will you put down the name of the theatre?

Mr. Westbrook: Yes, sir. I'm sorry.

The Witness: That is also the Rio. [2447]

Q. (By Mr. Westbrook): Also the Rio. Was there any instance where the Paradise and the Southside played day and date?

A. Yes. There were four.

Q. On what availability were those pictures?

A. On 7 day.

Q. What was the average gross of the Paradise on that group of four pictures? A. 3,677.

Q. And the average gross of the Southside?

A. 4,151.

Q. What was the percentage of the Paradise gross to the Southside? A. 88.

Q. Now, with reference to the United Artists Theatre, did you find any instances where the Paradise and the United Artists played day and date?

A. Yes, sir. There were three, two identical bills which played on 7 day availability, and one other instance on 14 day availability.

Q. Now, the two identical bills, you say, were on 7 day availability? A. Yes, they were.

Q. What did the Paradise gross on the average on those two bills? [2448] A. 1,398.

Q. What did the United Artists gross?

A. 1,639.

Q. What was the percentage of the Paradise gross of the United Artists gross? A. 83.

(Testimony of Cecil L. Dunn.)

Q. You say there was another program that played day and date top feature?

A. Yes, in which the top feature was played day and date, in the two theatres on 14 day availability. In that instance the Paradise grossed 1,509, and the United Artists 1,879, or the Paradise was 79 per cent of the United Artists gross.

Q. Now, Mr. Dunn, we come to the only remaining conventional theatre in the area, the Academy. I believe you have already stated that you found no instance where the Academy and the Paradise played day and date.

A. That is correct.

Q. Did you make a study, however, to study the relative performance of the Paradise and the Academy? A. Yes, I did.

Q. Will you state in what way?

A. What I have undertaken to do here was to compare the relative performance of the Paradise and the Academy on two groups of comparable pictures, two groups that in other markets [2449] sold just about as well. The reason I have had to go to this is because, as we have just been pointing out, there were no day and date exhibitions of the Paradise and the Academy.

Mr. Westbrook: Your Honor, I hadn't noticed that it was 3:00 o'clock. I think it may take us a little while to develop this and perhaps this is a good time to recess and then we can come back to it.

The Court: Ladies and gentlemen, we are about

(Testimony of Cecil L. Dunn.)

to take another recess. Again it is my duty to admonish you you are not to discuss this case with anyone, you are not to allow anyone to discuss it with you, and you are not to formulate or express any opinion as to the rights of the parties until this case has been finally submitted to you.

With that admonition we will now recess until 15 minutes after 3:00.

(Recess.) [2450]

The Court: Is it stipulated the jury are in the jury box?

Mr. Corinblit: Yes, your Honor.

The Court: You may proceed.

Q. (By Mr. Westbrook): Mr. Dunn, you called my attention to an error in computation here with regard to one of these averages which also affects the percentage, didn't you?

A. Yes. In the case of the Southside Theatre for the programs on which the Southside and Paradise played day and date, there is an error in averaging the gross admissions of the Paradise.

Instead of \$3677 which I gave you, it should be \$2927.

Q. \$2927? A. Right.

Q. And how does that affect the percentage?

A. Reduces it from 88 to 70.

Q. What is the significance of—strike that.

We were talking before we left—we have got one more to get up there I see. We were talking about the Academy and what you had done to obtain a comparison of the Academy and the Paradise.

(Testimony of Cecil L. Dunn.)

A. Yes. In the case of the Academy and the Paradise where there were no day and date exhibitions I took two groups of three pictures each which by the best standard I could apply to them were comparable pictures.

Q. What did you do to determine they were comparable? [2451]

A. Well, the best measure of comparability that was available to me was the national rental, national film rentals paid for the picture on all of its United States runs and the film rentals, total film rentals paid for the pictures in the Los Angeles Exchange territory runs.

I proceeded on the assumption that if two groups of pictures drew about as much in the national market and drew about as much in the Los Angeles Exchange territory market, that they were comparable pictures—that one had as good a drawing power—one group had as good drawing power as the other and as measured by the final measure of drawing power is what people will pay to see it.

Now, in the case of the three pictures which played at the Paradise, the national rental was \$5,414,000.

Q. That is the total on the group of three pictures?

A. That is the total on the group of three pictures, yes.

Q. What was the total on the group of the three pictures at the Academy?

A. \$5,236,000, a little bit less.

(Testimony of Cecil L. Dunn.)

Q. The national rentals on the three pictures at the Paradise was \$5,514,000? A. \$414,000.

Q. And at the Academy \$5,236,000?

A. Right. [2452]

Q. Now, you also mentioned the Los Angeles Exchange territory performance.

A. Right. The three pictures that played at the Paradise had Los Angeles Exchange territory rentals of \$325,000 and the three which played at the Academy had a Los Angeles Exchange territory rentals of \$305,000.

So, here are two groups of three pictures which in my judgment as measured by this pretty good measure of their drawing power, were closely comparable.

Q. Did you take into consideration at all in determining these two groups of three pictures the dates that they played at the respective theatres?

A. Yes. I did do that. All of them played on 7 day availability except of the two theatres and all of them played within the period of which we are concerned here. And the seasonal distribution is about the same. One played at the Paradise in September of 1950, one played at the Academy in August of—or, two in September of 1950 at the Paradise and one at the Academy in August and two in November. One played at the Paradise in October of 1950. In other words, there is no seasonal difference which would, I think, distort the comparability.

(Testimony of Cecil L. Dunn.)

Q. Now, on that basis, what did you determine the average weekly gross to be at the Paradise?

A. The average weekly gross at the Paradise was \$2318. [2453]

Q. May I have that again? A. \$2318.

Q. And at the Academy? A. \$3957.

Q. And what is the percentage comparison?

A. The Paradise gross was 52 per cent of the —no, wait a minute. That is wrong. Excuse me. That calls for a little arithmetic here. Excuse me. I took the slide rule apart a while ago to use it to scale the map, and didn't put it back together. I am accustomed to seeing it that way because my child is forever taking it apart and doing the same thing.

Now, we are getting it. It is 59 per cent. [2454]

Q. Now, you stated that those three pictures played on a 7 day availability? A. Yes, sir.

Q. Three at the Paradise and three at the Academy, is that correct? A. That is correct.

Q. In making that comparison, did you give any special attention to second features?

A. Yes, I did.

Q. Will you state just generally what consideration you did give them?

A. Well, for one thing I undertook to identify the second features, to compare them from the standpoint of the rentals which were paid for them in each instance, and to discover to what extent the second feature which was being played might have had its value impaired by having been played

(Testimony of Cecil L. Dunn.)

elsewhere in the area at the same time or shortly before, and so on.

The three pictures, the three second features which played with the group of three pictures at the Paradise had flat weekly rentals as follows: \$200, \$200, and \$500, and the three which played at the Academy on these three programs which I mentioned had flat weekly rentals of \$144, which seems a little odd, \$170 and \$150.

So if there is any particular advantage, as [2455] measured by that standard, which is, I suppose, comparable to the other rental standards which I have applied here, then the advantage lay with the group of second features which played at the Paradise.

Q. Can you state the distributor of the second features at the Academy?

A. At the Academy there were two Monogram pictures and one Republic.

In the Paradise there was one Monogram, one Columbia and one Universal.

Q. In terms of the study you were making, Mr. Dunn, what is the significance of this comparison of average gross?

A. I think there is considerable significance in this tabulation which we have here. If we look at the 7 day runs and compare the grosses of the Paradise with the grosses of the other theatres, we find that the Paradise does substantially less well than the theatres with which it is competing.

(Testimony of Cecil L. Dunn.)

In the case, however, of the 21 day runs, the Paradise does better.

Now, this, I think, is directly related to the discussion which we have been having earlier about, first, the population of the Westchester area, which the Paradise can draw upon. You remember that we said that within the two mile circle around the Paradise there were approximately 40,000 persons at that time. [2456]

Secondarily, that when we were talking about 21 day runs, a two mile circle was just about where the bulk of the patronage would come from. That is what is happening here.

When the Paradise runs at 21 day program, it draws well upon its immediate audience in the Westchester section as such, and competitively stands up well.

On the other hand, when it gets up into higher availability runs, and particularly 7 day runs, and has to compete with the other theatres playing equivalent or the same bills, it doesn't do as well. It is obviously a neighborhood community theatre, not well situated to compete farther afield.

Q. In pursuing your study of the Inglewood-Westchester area, you mentioned that you gave consideration to the results achieved on the Paradise Theatre survey in November 1950, is that correct?

A. Yes, I did.

Q. In that connection you studied the actual questionnaires that were returned, is that right?

A. I did.

(Testimony of Cecil L. Dunn.)

Q. Do you have any opinion, Mr. Dunn, with regard to the reliability of that type of survey as compared with the type of patronage survey that you conducted? A. Yes, I have.

Q. Will you state what that opinion is? [2457]

A. I think there were different kinds of work. In the patronage survey of the Academy Theatre, as I said this morning, we were asking people as a matter of fact, where did you come from to go to the theatre?

In the survey which was made for the Paradise Theatre, the questions were of a radically different character. Most of them were, I think, directed at the idea of selling the Paradise, rather than at the idea of getting information as such.

For example, they contained such things as Do you know about your hearing aids? And do you know about our crying room? Presumably for babies.

Do you know about the parking space and things like that. They weren't questions of a factual nature.

Then, further, instead of, with very few exceptions, they were questions of What would you do character rather than What have you done? There were, of course, What have you done questions in there. Have you attended the Paradise Theatre and so. What theatres do you attend? Things of that character.

But, generally speaking, it was more of what you might call an opinion survey, and more of a

(Testimony of Cecil L. Dunn.)

public relations job, than it was a specific undertaking to determine some facts.

Q. Mr. Schreiber testified, Mr. Dunn, that he [2458] instructed his interviewers going out to make that survey to introduce themselves by saying they were from the Paradise Theatre. Does that have any effect on the validity of such a survey?

A. That tends to produce answers which are in a measure biased. One of the interesting things about doing this kind of work is the extremely co-operative attitude which people take. It is surprising. You can go and ask people almost anything and they seem happy to answer you, and you always have to make allowance for bias in your favor. If you say, "Do you use Ivory Soap?"

"Oh, yes, we use Ivory Soap."

You always have to make allowance for that sort of thing.

I think in a case of this kind when they say, "We are making a survey for the Paradise Theatre," always there is a predisposition to help the boy along. He is working for the Paradise Theatre and "We will give him some nice friendly answers." That happens very frequently. As a matter of fact, if you are going to try to determine really precise results in a survey of this kind, you have to be extremely careful to avoid introducing the possibility of a bias of that character, and you have to make allowances for it in your results. A statistician normally does so. [2459]

Q. Now, in connection with that survey, you re-

(Testimony of Cecil L. Dunn.)

call, Mr. Dunn, that there was one question asked about the use of the automobile to attend the theatre. A. Yes.

Q. At page 1902 of the transcript it was stipulated that out of 579 responses, 489 said they drove to the theatre. You are apprised of that fact?

A. That is right.

Q. Now, what significance does that fact have in relationship to your judgment with respect to the existence of substantial competition between the Paradise and other theatres?

A. A high degree of fluidity on the part of the people who were interviewed in that questionnaire. If there was an attractive picture within reasonable driving distance, they would go to see it. I mean that substantially reinforces—well, it bears out the four-mile draw idea. Nobody is going to walk four miles, at least not in Southern California.

People will move very readily to go to an attractive picture which is being exhibited within quite a reasonable radius.

Q. Now, also at page 1902 it was stipulated that out of 726 answers, a total of 17 said that they used the Inglewood newspaper to go to the theatre. It [2460] has also been testified that the Paradise Theatre used the Inglewood paper for its advertising, for part of its advertising.

Did you take that fact into consideration?

A. Yes, I did.

Q. And will you state how it affects your opinion with regard to substantial competition?

(Testimony of Cecil L. Dunn.)

A. Well, my view there, of course, is that since only 17 people in Westchester, at least 17 of the respondents to the Paradise Theatre survey said that they read the Inglewood paper in looking for theatre information.

The proprietors of the Paradise in advertising it in the Inglewood paper must certainly have been looking for patronage in Inglewood.

The Inglewood paper doesn't circulate to any great extent in the Westchester area. There is a local newspaper in the Westchester area, a weekly. As a matter of fact, the Inglewood paper doesn't make any effort to achieve or maintain circulation in the Westchester area, so if they are advertising in it it must be with, I think, with a view to drawing patronage from Inglewood and the area east of Westchester where the Inglewood paper circulates.

Q. Now, you did observe in your study of the Paradise Theatre survey of the residents of Westchester the question "What theatre do you attend"?

A. Yes, I did. [2461]

Q. And you made, to the best of your ability, an analysis of the responses to that question?

A. I did.

Q. Now, in that connection, Mr. Dunn, to what extent do you believe that—to what extent is it your opinion that the answers given in response to the survey indicate any particular pattern with respect to patronage?

A. I don't think they indicate very much beyond

(Testimony of Cecil L. Dunn.)

indicating a considerable degree of what I have called fluidity,—mobility. Beyond indicating a very large proportion of the people in the area are willing to go outside of the area, some 44 per cent, I think the total is, were willing to go outside of the area in search of entertainment. I don't think it was a very meaningful survey.

Q. Excuse me just a minute, Mr. Dunn. Now, Mr. Dunn, I have placed before you Plaintiff's Exhibit 64 in evidence, which is the plaintiff's tabulation of the results of the theatre survey, and I have placed on the board here joint plaintiff and defendants' Exhibit T in evidence, which was an exhibit prepared in the course of the cross examination of Mr. Alex Schreiber, about this survey.

Now, you mentioned that in your opinion the results of the survey indicated a certain amount of fluidity on the part of the residents of Westchester or an inclination to go elsewhere. [2462]

A. Yes, that is right.

Q. You will note Exhibit 64 which you have in your hand shows a breakdown into four categories which are reflected roughly on the board.

You have had occasion to go over that breakdown and examine it? A. Yes, I have.

Q. Now, would you step to the board here and point out the factors present which indicate to you the conclusion that you have expressed?

A. In the first category here we have 307 responses out of 549 total.

(Testimony of Cecil L. Dunn.)

In other words, 307 people said that they went to Westchester theatres. 56 per cent give that as what I presume to be a first choice, which leaves 44 per cent which I referred to a few moments ago as people who were willing to go outside of the Westchester area or who characteristically went outside the Westchester area or who at least had a first choice outside the Westchester area.

It is pretty hard to decide just what some of these responses do mean, but I think that is a reasonable assumption. 56 per cent of the people characteristically attended Westchester theatres and 44 per cent went elsewhere—in the elsewhere category.

There are 104 people mentioned—who mentioned [2463] other theatres in the Inglewood and Westchester area. That is 19 per cent of the total. 39 people mentioned other theatres outside the Inglewood-Westchester area—7.1 per cent and 99 people said theatres wherever they were situated. It depended upon the picture. That is 17.9 per cent.

These are the \$2 people we were talking about this morning who are willing to go and pay for the pleasure of obtaining first run and so on who characteristically go outside.

Q. Now, Mr. Dunn, if you will turn to the third page of Plaintiff's tabulation of this survey, Exhibit 64, you will note a question relating to drive-ins. A. Yes.

Q. Now, will you state the result of that question as reflected in plaintiff's tabulation and state

(Testimony of Cecil L. Dunn.)

what significance it has with respect to your opinion as to the existence of substantial competition between the Paradise and other theatres?

A. 252 people—let me see, the total number of responses to this question was 637. 252 of them said that they attended drive-in theatres.

Q. And 83 did not indicate?

A. 83 did not say anything, so we will—we should really leave out the 83 since the question isn't answered, which would reduce the total number to some place around 550 total responses, and a little less than half of them [2464] said they attended drive-in theatres.

Obviously you go to a drive-in theatre in an automobile. Again, it is evidence of this fluidity, this willingness to get around, the willingness to go see the picture that you want to see.

Now, of course, in the case of drive-ins, it is easier to take the children which I suppose adds up to a part of the competition.

Q. There were two drive-ins in the Inglewood-Westchester area during this period of time, the Century located near Imperial.

A. That is right.

Q. And the Centinela located up in the open space to the north of Westchester.

A. That is right, and I would say 45 per cent of the respondents, leaving out the "No" answers attended drive-in theatres.

Q. Now, were there any other conclusions that

(Testimony of Cecil L. Dunn.)

you felt able to draw from the Paradise questionnaire in November of 1950?

A. Well, let me review some of my notes here.

Q. I think you stated—I might as well clear that up, I think you stated you had gone about as far as you thought you could go?

A. Yes, I think I have gone about as far as I think I can. [2465]

Q. Now, there has been a good deal of mention in this case, Mr. Dunn, of the picture *Born Yesterday* which played day and date at four theatres. I believe that is correct, is it not?

A. That is right, the Paradise, the Southside, La Tijera and the Imperial all at the same time.

Q. Now, did you examine the results achieved on this picture during the first week of its exhibition in the Inglewood-Westchester area?

A. Yes, sir, I did.

Q. And then also the results of another picture?

A. I did.

Q. Let us put *Born Yesterday* down this way, Mr. Dunn, and I will put a column here headed *Born Yesterday*. The four theatres again were the Paradise——

A. La Tijera, Imperial and Southside. The picture played from March 14th to the 20th of 1951.

Q. The play dates are—— [2466]

A. 14th to 20th, 1951.

Q. 3/14-20/51. Now, did you determine the national film rentals on that picture?

A. Yes, I did.

(Testimony of Cecil L. Dunn.)

Q. Will you state the amount?

A. \$3,973,000.

Q. That is the total returns to the distributor from domestic distribution?

A. That is correct.

Q. Did you also determine the Los Angeles exchange territory rental on that picture?

A. Yes, I did.

Q. And that amount? A. \$326,000.

Q. Just so the jury is aware of the area encompassed within the Los Angeles exchange area, will you state it as you understand it?

A. Southern California, Arizona, and Clark County, Nevada, Las Vegas in other words.

Q. The Paradise first week's gross on that picture was what? A. \$3,718.

Q. And the Southside's first week's gross?

A. \$4,684. [2467]

Q. Now, were you able to find a comparable picture at all that played just day and date at the Southside and Paradise? A. Yes, I think so.

Q. When I say comparable, I mean comparable in terms of results produced.

A. Yes, and in reputation and so on. At least, it is another picture—well, it was a first-class picture. It didn't gross as well either nationally or in the Los Angeles exchange territory, but it was a good picture.

Q. And that was Sunset Boulevard to which you referred? A. That is correct.

(Testimony of Cecil L. Dunn.)

Q. And that played day and date at the Paradise and Southside?

A. That's right, October 5 to 11, 1950.

Q. Did you determine the national film rentals on that picture? A. Yes.

Q. What were they?

A. \$2,096,000 about half as much as Born Yesterday.

Q. And the Los Angeles exchange territory film rental on that picture? A. \$158,000.

Q. A little less than half as much?

A. Right. [2468]

Q. Did you then determine the Paradise gross on the 7 day run of that picture?

A. Yes, I did.

Q. For the first week? A. Right.

Q. How much was it? A. \$3,849.

Q. And the Southside gross? A. \$4,688.

Q. With reference to that comparison, Mr. Dunn, will you state how that figures in your opinion as to the existence of substantial competition between the Paradise and other theatres in the area?

A. Yes. Here we have two pictures, both admittedly good pictures and both drawing well nationally in the United States, but one which is clearly substantially more able to gross large revenues than the other. In other words, Born Yesterday was terrific and drew nationally and in Los Angeles twice as much as Sunset Boulevard. Sun-

(Testimony of Cecil L. Dunn.)

set Boulevard, of course, was still a good picture and did well.

Born Yesterday played in the four theatres which are indicated there, the Paradise, La Tijera, the Imperial and the Southside.

Then we come to Sunset Boulevard, a picture which nationally did only half as well, but which [2469] played day and date only at the Paradise and the Southside, and the Paradise does just as well with it as it did with Born Yesterday. In other words, in the absence of competition from the Imperial and the La Tijera, they are able to do just as well with a weaker picture as they did with an absolutely top picture with the heavy competition of the other two adjacent theatres.

Q. When I said before were you able to find a comparable picture, Mr. Dunn, I really should have said could you find another picture that had played date and date at the Paradise and Southside with the same national rental and the same Los Angeles exchange territory rental.

A. That is what I meant to imply.

Q. And the answer to that is no.

A. The answer is no. The term comparable is a term which I am using for this comparison.

Q. I would like to consider with you for a moment the question of the effect of a small or relatively small reduction in gross upon the profits of a theatre. For that purpose I would like to take the Academy Theatre which figured in some computations by plaintiff's counsel last week.

(Testimony of Cecil L. Dunn.)

The Court: Are you opening up a new subject?
How long is this going to take?

Mr. Westbrook: Well, I doubt that we can finish it, although I am certainly prepared to go ahead.

The Court: I wish you would put down that [2470] sheet again. I want to ask the witness some questions.

Mr. Westbrook: Very well, sir. Excuse me.

The Court: Based on your statement a little while ago about the fact that the Paradise could do just as well with a poor picture as they could with a superior picture when compared to the Southside Theatre, would you consider that the Southside Theatre and the Paradise Theatre were in substantial competition?

The Witness: Now, let's put another phrase back in the statement I made.

The Court: All right. If I haven't quoted you correctly, you go ahead.

The Witness: I said that the Paradise in the absence of competition from the other two theatres, specifically, the La Tijera and the Imperial, did as well with a weaker picture as it could with the top picture in the presence of that competition.

The Court: Those figures you put on the board there, the comparisons, do they indicate to you in any way that there was or was not competition between the Paradise and the Southside?

The Witness: Going back to my—for a moment to my geographic standard here, competition on

(Testimony of Cecil L. Dunn.)

day and date runs on relatively high availabilities, and remembering the four mile circle, I would say yes, there is competition between the Paradise and the Southside. [2471]

The Court: What is the mileage between the Paradise and Southside?

The Witness: 6.6, as going up the streets, not flying through the air.

The Court: And 6.6, you still think there is competition between the two theatres?

The Witness: Yes, I do. Will you look——

Mr. Corinblit: Would you add the word substantial to that, your Honor?

The Court: So you consider it substantial competition?

The Witness: Yes, I would.

(Witness going to blackboard.)

There are four miles out here. Here you are. Here is the four mile circle with the radius around the Paradise. Then we come over here, and here is our four mile circle around the Southside, and here is this nice big football-shaped area right in the middle. On day and date runs they are in competition. I mean anybody who lives some place in here can make up his mind which way he wants to go, depending upon all the other things that tend to make him go one way or another.

I really think they are, sir.

(Witness resuming stand.) [2472]

The Court: The reason I asked you the question

(Testimony of Cecil L. Dunn.)

is because I took it from your answer that even though—I took it from your answer that the Paradise would do just as well with a poor picture as with a good picture as far as the two theatres were concerned?

The Witness: No, no. I think your Honor mistakes my intent here. What I am trying to do with this exhibit——

The Court: I am just like the jury. All I know is what you say. I got the impression from what you said that it would do just as well. The jury may have gotten an entirely different impression.

The Witness: The impression which I would like to have the jury get is that this shows the effect of competition between the Paradise and the La Tijera and the Imperial specifically, because when they had a top picture, an absolutely top picture *Born Yesterday*, it was playing day and date with all of these theatres.

This was what they could do in competition with the other theatres.

Apparently they did pretty well. Then they take another picture which nationally doesn't rate as high, which in the Los Angeles exchange territory doesn't rate as high, but they show it only in competition with the Southside.

They are free in this instance from competition with the Imperial and the La Tijera and they do just as well on their [2473] own gross with a picture which is half as good. In other words, when the competition of those two theatres was not there,

(Testimony of Cecil L. Dunn.)

they practically doubled their capacity to make a revenue out of the picture.

This exhibit, sir, runs to competition between these theatres. Not so pointedly to competition between the Paradise and the Southside.

But to return to your question. Is there any competition between the Paradise and the Southside.

The answer is yes.

On a 7 day availability run where the four-mile circle contains the bulk of the patronage, that competition is severe on successive runs, where the normal drawing circle gets smaller and smaller it isn't quite so tough, but it is still substantial competition, yes.

Mr. Westbrook: Your Honor, if I may before we recess, I would like to offer in evidence the map of the Academy Theatre patronage survey as Defendants' Exhibit Y-2, Joint Plaintiff and Defendants' Exhibit Y-2, and the gross admissions comparison as Joint Plaintiff and Defendants' Exhibit Y-3, and the Born Yesterday-Sunset Boulevard comparison as Joint Plaintiff and Defendants' Exhibit Y-4.

Mr. Corinblit: Your Honor, we will object to particularly the last one, the comparison Mr. Westbrook just turned down, unless we have a foundation laid and the actual figures of the [2474] individual theatres offered in evidence as well—that is, at the same time we should have the figures.

The Court: The objection is overruled. On cross

(Testimony of Cecil L. Dunn.)

examination you can use any figures you want to and cross examine this witness. You can show the witness is wrong if you can. That is your prerogative.

Mr. Corinblit: What I am talking about is the figures upon which this witness based his statistics. That is what I am directing your attention to.

The Court: Objection overruled. It may be admitted in evidence.

(The exhibits referred to were marked Joint Plaintiff and Defendants' Exhibits Y-2, Y-3 and Y-4, and received in evidence.) [2475]

* * * * *

Q. (By Mr. Westbrook): Mr. Dunn, I call your attention to the—Mr. Corinblit called our attention yesterday in the course of our comparison of our day and date exhibition to a difference in play dates of the program *Petty Girl* and *Convicted* at the Fifth Avenue and Paradise, indicating that the program had played one day longer at the Fifth Avenue than the Paradise. [2479]

Have you since checked the gross on that final day at the Fifth Avenue? A. Yes, I have.

Q. And will you state what the gross for an exactly comparable period of time is at the Fifth Avenue?

A. It now becomes \$2144 instead of the \$2318 which——

Q. \$2144?

A. Yes, instead of \$2318 which we used yesterday.

(Testimony of Cecil L. Dunn.)

Q. How did that affect the percentage here?

A. The percentage which we used yesterday was 57 per cent and should now be 61 per cent.

Mr. Corinblit: I don't want to interrupt, but will you tell me now the dates?

Mr. Westbrook: I will give you a corrected work sheet for September 29 to October 4 for both theatres. In other words, a total of five days for each theatre.

Q. Now, he also called our attention yesterday, when we were presenting this matter, to the fact that the picture Break Through, which was the second Fifth Avenue and Paradise day and date exhibition, had played for two days longer at the Fifth Avenue than at the Paradise. How you also now adjusted the gross for the Fifth Avenue to eliminate the last two days of exhibition?

A. Yes, I have.

Q. And what is the revised figure? [2480]

A. That revised figure should be \$2287 instead of \$2780 which we used.

Q. And how did that affect the percentage on that comparison?

A. The percentage which we used yesterday was 68 per cent, but should now be increased to 83 per cent.

Q. Now, Mr. Corinblit called our attention also yesterday to a difference in play dates on the picture Sunset Boulevard at the Paradise and the Fox theatres, which was one of the five included in this group here. A. Yes.

(Testimony of Cecil L. Dunn.)

Q. Have you now had occasion to recheck the play dates on those pictures? A. Yes, I have.

Q. Will you state the results of your check?

A. There was a transposition in my record here. The play date at the Paradise was from October 12th to 17th of 1950.

Q. 12th to 18th, was it not?

A. Yes, 12th to 18th, 1950, and at the Fox, October 12th to 17th.

Q. So in that instance the picture played one day less at the Fox than the Paradise?

A. Right.

Q. And because of that fact, because it tended [2481] to favor the Paradise in that comparison you made no adjustment in that comparison?

A. That is correct. [2482]

Mr. Westbrook: Calling your attention to the comparisons between the Paradise and the Southside, I find some confusion has developed on the grosses, counsel, on Tea For Two. Your Exhibit 45-J, which is the play-off of the Paradise Theatre, does not give a one-week gross. It gives it for two different periods of time which do not total one week.

I would now like to ask for a stipulation, if I may, based upon the box office reports which you produced for me this morning, that the program headed by Tea For Two at the Paradise Theatre grossed a total of \$1,658.99, or roughly \$1,659 in the one week's playing time.

Mr. Corinblit: To move this along, let's stipu-

(Testimony of Cecil L. Dunn.)

late with you that that is a fact, subject to correction.

Mr. Westbrook: That is September 20 to 26, 1950.

Mr. Corinblit: We will take that stipulation subject to correction.

Mr. Westbrook: All right.

Q. Now, does that correction in Plaintiff's Exhibit 45-J, Mr. Dunn, affect the comparison which you have made here, I believe we took the gross from another record which proved to be less unreliable, but would you state the effect of that correction?

A. The gross I used for the Paradise was \$2,015. If we use instead the \$1,659, the average which we are employing here in this comparison between the Paradise and Southside [2483] should be corrected to \$2,927, instead of \$3,677, which we had before. We had 3,677.

Q. I think we made that correction yesterday. Isn't there a further correction, Mr. Dunn, a further change?

A. Let me look. Excuse me if I do a little rapid arithmetic here. I hope it proves to be rapid arithmetic.

Q. Mr. Dunn, if it is going to take any length of time, perhaps we can pass that and come back to it during recess.

A. If you will, please.

Q. And then put it on the exhibit by stipulation of Mr. Corinblit.

A. Thank you.

(Testimony of Cecil L. Dunn.)

Q. Referring to the three comparable pictures in the Academy Theatre and the Paradise, which are reflected in the last entry here, there is also an adjustment in that comparison by reason of the same error in Plaintiff's Exhibit 45-J, is that not correct? A. That is correct.

Q. In that instance you had used the \$1,585 gross shown on Plaintiff's Exhibit 45-J, rather than \$1,659 gross we have now stipulated to, is that right? A. That's right.

Q. Substituting 1659 gross for Tea For Two as one of the three comparable pictures, how does that affect the average Paradise gross on the three comparable pictures? [2484]

A. We had indicated it to be \$2,318, and this makes it \$2,343.

Q. How does that affect your percentage?

A. That is a negligible change in percentage.

Q. Taking into consideration all of these adjustments, these three or four adjustments that have been called to your attention, partly as a result of Mr. Corinblit's comments yesterday, do they affect in any way the opinion you expressed about the significance of this exhibit, which is now marked Joint Distributor Defendants' Exhibit Y-3 with regard to your opinion as to the existence of substantial competition?

A. No, it does. The conclusion is the same.

Q. Mr. Dunn, you mentioned yesterday the four mile radius as being the drawing area of a 7 day theatre, or a theatre in this area showing pictures

(Testimony of Cecil L. Dunn.)

on a 7 day availability. A. That's right.

Q. And in response to Judge Westover's comment or question, you indicated that it was your opinion that substantial competition existed between the Paradise and the Southside Theatre. I think it might be helpful if, preparatory to discussing that point a little bit further, you would come down and outline with this red crayon here a four-mile radius from the Paradise and Southside respectively.

(Witness leaving stand and going to blackboard.) [2485]

The Witness: That is the area I was talking about.

Q. (By Mr. Westbrook): Will you point out to the court and jury the area to which you had reference?

A. This is the four-mile radius from the Paradise and this is the four-mile radius from the Southside and this is the thing which I referred to as the football shaped area yesterday, which is a pretty fair fraction of the four-mile circle around both of the theatres, and obviously a larger fraction of the four-mile circle around the Paradise because it still has the ocean out here and population-wise a much more significant fraction on account of an uninhabited, shall we say, territory—the airport, the Baldwin Hills, the marsh out here in Playa Del Rey.

Q. Would you comment briefly on the character of the area that lies in that football shaped portion

(Testimony of Cecil L. Dunn.)

which you placed on the Distributors Defendants' Exhibit Y-2 in evidence?

A. It contains first—also some uninhabited territory—the Inglewood Park Cemetery and the Potrero Country Club and the race track right here, but otherwise it contains a very substantial portion of the center of Inglewood proper and the bulk of the residential area in the communities to the south of Inglewood, Hawthorne, Lennox and so on.

And also as indicated here by this population information which we developed with respect to the Academy, a rather densely [2486] populated area over in here.

Q. You say "over in here." You are referring to the area east of Lennox and Hawthorne, is that correct?

A. Well, generally to the east of this football shaped segment. It is good territory from the standpoint of potential patronage, saving only those sections which I referred to which don't contain any patrons.

Q. Now, in describing that four-mile radius, you have used the scale shown on the map, is that correct?

A. Yes, I have.

Q. I mean by using a string, of course, it may be a quarter of a mile one way or the other—it may vary as much as a quarter of a mile in either direction?

A. That is right.

Q. Now, did you make any study, Mr. Dunn, of the operating records and the distributors' rec-

(Testimony of Cecil L. Dunn.)

ords of theatres in the Inglewood-Westchester area to attempt to verify or check your opinion that the Paradise Theatre and the Southside Theatre were, in 1950 and 1951, in substantial competition for patronage?

A. Yes, I did. In the absence of any direct day and date comparisons between the Paradise and the Southside——

Q. You say there was an absence of any direct comparisons. What do you mean, Mr. Dunn? Were you able to find any instance where either the Paradise or Southside had played [2487] on an exclusive run in the area? A. No.

Q. So that all you had were instances where the Paradise and Southside had played day and date, is that correct?

A. That is correct, yes.

Q. Lacking any instance where the Paradise had played on exclusive run, what did you do?

A. I turned to a comparison between exclusive runs at the La Tijera Theatre and have compared those with a group of pictures of comparable quality, as measured by the standard which I employed yesterday. The pictures played day and date at the La Tijera and at the Southside.

Q. On what premise did you adopt that comparison as a means of evaluating competition between the Paradise and Southside?

A. The La Tijera Theatre is in the same general area as the Paradise. It is somewhat northeasterly of it in the Inglewood-Westchester area. It is situ-

(Testimony of Cecil L. Dunn.)

ated on the same principal thoroughfare there. It is a little closer to the Southside.

Q. Will you state the mileage from the Paradise to the Southside Theatre, and from the Southside Theatre to the La Tijera?

A. From the Paradise it is 6.6 and from the La Tijera it is 6 and a quarter and it seemed in general to me that in [2488] the absence of information on exclusive runs at the Paradise, a comparison between the Paradise and the La Tijera would say the same things about competition between the Southside and a theatre situated in the Westchester area as a comparison between the Southside and the Paradise itself. [2489]

Q. In other words, in evaluating this problem of substantial competition in the area, you considered the competitive situation of the La Tijera and the Paradise to be generally comparable as compared to the Southside Theatre?

A. That is correct.

Q. I think it may be helpful if in this instance we put on the board the specific pictures that were involved in your comparison. I think you mentioned that in each instance, that is, in the instance of exclusive runs, you used a group of three pictures, and in the instance of day and date runs, you used a group of three pictures?

A. That's right.

Q. Were those all on the 7 day availability, at least so far as the top half of the double bill is concerned?

A. That is correct.

(Testimony of Cecil L. Dunn.)

Q. I am going to put on the top of this piece of paper La Tijera Theatre, day and date with Southside.

Now, will you take us down through the pictures that you used in getting a group of three pictures for the day and date examples?

A. For the day and date examples, I used the Paramount picture Fancy Pants.

Q. Will you go slowly enough so I can follow you here? A. Yes.

Q. I am marking this down on the paper on the board. That was Paramount? [2490]

A. That was a Paramount picture, yes.

Q. And the play dates on that?

A. From October 25 through 31 of 1950.

Q. Now, you mentioned you used the same standards as you had indicated yesterday in making the comparison of the Paradise and Academy.

A. That's right.

Q. That is to say, national rental realized on the picture and the Los Angeles exchange territory rental.

A. That's right. The national rental on that picture was \$2,481,000.

Q. I am going to drop the last three digits here to give myself space on this paper. That won't affect the results, will it?

A. No. Call it thousands of dollars. The Los Angeles exchange territory was \$129,000.

Q. I will put down 129 there. A. Right.

Q. What was the gross realized on it?

(Testimony of Cecil L. Dunn.)

A. 2,859.

Q. That was on a one week exhibition?

A. Right.

Q. What was the second picture that you used?

A. The second picture was a Warner Bros. picture, Only The Valiant. That played from May 2 through 9, 1951. [2491] The national rentals were \$1,697,000.

The Los Angeles exchange territory rental was \$88,000, and the Paradise gross was \$2,137.

Mr. Corinblit: Paradise gross, Mr. Dunn?

The Witness: \$2,137.

Q. (By Mr. Westbrook): La Tijera gross, you mean? A. Oh, I beg your pardon.

Q. Again, still on the day and date exhibition——

A. The third picture was Along The Great Divide, also a Warner Bros. picture. That played from June 13 through 19, 1951.

The national rentals were 1,214,000.

The Los Angeles exchange area territory rentals were 73,000, and the La Tijera gross was 1,303.

Q. Do you have the totals on those three grosses?

A. The national total for the three pictures, \$5,332,000, and the Los Angeles exchange territory, 290,000.

Q. And the total on the gross?

A. 6,299, for an average for the three pictures of 2,099.

Q. Let's call it 2100. It is easier to work with.

A. 2100, yes.

(Testimony of Cecil L. Dunn.)

Q. Let's run down the group of three that you used as exemplars of the exclusive run—first of all, did you have any difficulty finding exclusive runs for the La Tijera? [2492]

A. Yes, I did. There were not a great many of these.

Q. Will you now state the pictures that you used in that comparison? I believe the first is Duchess of Idaho, is that right?

A. That's right, Duchess of Idaho, which played from August 22 through 29, 1950. The national——

Q. Isn't that 23 through 29, Mr. Dunn?

A. 23 through 29. Excuse me. Yes.

Q. That was an MGM picture?

A. That's right.

Q. Before we get down to the results, let's just put down the national and local rentals, and then we can develop them one by one as to the grosses thereafter.

A. National gross was \$2,360,000.

Q. Is that 2,685,000?

A. Oh, I beg your pardon. I have written so much on this paper. 2,658,000.

Q. The Los Angeles exchange territory rental?

A. 118,000.

Q. Before we leave that picture, was there another Metro picture at approximately the same time that also played exclusive first run?

A. Yes, there was.

Q. That was Summer Stock?

A. Summer Stock, right. [2493]

Q. That had approximately the same national

(Testimony of Cecil L. Dunn.)

and Los Angeles exchange territory rentals, is that right?

A. Just about. It was a little lower on the national rentals and a little higher on the Los Angeles exchange territory.

Q. Did it gross more or less at the La Tijera than Duchess of Idaho?

A. At the La Tijera, it grossed approximately \$600 more than the Duchess of Idaho. [2494]

Q. And why then did you select the Duchess of Idaho for this comparison?

A. It seemed to me by and large that the Duchess of Idaho offered the most favorable and generally stable comparison which was possible here.

Q. If you used Summer Stock instead of Duchess of Idaho would it tend to enlarge or decrease the weight attached to the exclusive run in this comparison? It would serve to enlarge it, would it not?

A. It would by the difference, of course, between the grosses on the two pictures.

Q. So that the selection of Duchess of Idaho represents the more conservative choice?

A. Precisely, yes.

Q. Now, take the next picture that you put in this group.

A. The next picture was one—was also an MGM picture Watch The Birdie. It played from February 10th through 16th of 1951. The national rentals were—

Q. That was February 10th⁴ to 16th?

(Testimony of Cecil L. Dunn.)

A. Right. \$1,200,000.

Q. And the Los Angeles exchange territory?

A. Los Angeles exchange territory rental was \$65,000 and the La Tijera, \$2139.

Q. What was the next picture? [2495]

A. The third picture was a Paramount picture Passage West. It played July 25 to 31st, 1951.

Q. What was the national rental on that picture? A. \$1,059,000.

Q. What was the Los Angeles exchange territory rental? A. \$52,000.

Q. Now, do you have the totals on those two columns of figures?

A. Yes. The total national rental was \$4,944,000. The Los Angeles exchange territory rentals were \$248,000.

Q. All right. Now, just a minute. In other words, in making this comparison the national rentals on the group of three pictures playing day and date were slightly larger than the national rentals on the three pictures playing on the exclusive run?

A. That is right. Just about \$400,000 more.

Q. And similarly the Los Angeles exchange territory rental on the group of three pictures that you are making comparison on were slightly more—that is, the group of three day and date pictures was slightly more than the Los Angeles exchange territory rentals on the three pictures on the exclusive run? A. That is right.

Q. Now, let us go down and record the grosses

(Testimony of Cecil L. Dunn.)

actually achieved by the La Tijera on these three pictures. [2496]

A. The Duchess of Idaho was \$3,309.

On Watch The Birdie as indicated a moment ago, \$2139 and on Passage West, \$2291.

Q. And now what is the total of those?

A. \$7739.

Q. And the average of the three pictures?

A. \$2580.

Q. So that it is then correct to state that the group of three pictures playing on exclusive run grossed on the average \$480 more than the group of three pictures playing on the day and date run, is that right? A. That is correct.

Q. Now, have you calculated the percentage that that \$480 is of the average of \$2580 on the exclusive run?

A. Yes, but let me check again. It is 18.6 per cent.

Q. Now, will you explain, Mr. Dunn, the significance of this comparison in terms of your opinion that substantial competition existed between the Paradise and the Southside Theatres?

A. We have here a situation in which the La Tijera is playing to comparable groups of pictures.

When they played the group on exclusive run their revenues averaged 18.6 per cent more than when they played day and date with the Southside. In other words, when they were in [2497] competition with the Southside, a bite of approximately 18.6 per cent was taken out of their total revenue. And

(Testimony of Cecil L. Dunn.)

18.6 per cent certainly falls well within any of the various definitions of substantial competition which I have used.

Now, if this happens to the La Tijera, I am of the opinion that a similar situation would develop as between the Southside and the Paradise playing in similar circumstances. Or, in other words, to carry it to the conclusion which Mr. Westbrook's question calls for, there would be in these instances substantial competition between the Paradise and the Southside Theatres.

Q. Now, Mr. Dunn, there has been some testimony in this case about when the Academy and the Southside played day and date.

Now, I take it it would be your opinion that based on what you have already said, the Academy and Southside are actually in substantial competition?

A. Yes, certainly.

Q. Would you state whether you regard the competition that the Academy Theatre would receive from the Southside Theatre playing day and date, to be more or less severe than the competition it would receive from the Paradise Theatre playing day and date?

Mr. Corinblit: I object to that for the reason no foundation has been laid as to the "severity of competition." [2498]

The Court: Overruled.

The Witness: Yes. I think that the competition which the Academy would receive from the Paradise would be substantially greater than the compe-

(Testimony of Cecil L. Dunn.)

tition which it receives from the Southside in comparable circumstances, because as I have pointed out the only place that the Paradise can go for the additional patronage, which it would have to draw in order to obtain the audiences which 7 day availability would call for, is to the east. The people aren't immediately around it in the Westchester community as such. They aren't out in the ocean. They are not on the International Airport. They are out there in the base of that big triangle at the center of which is where the Academy is located. It would be much more severe between the Paradise and the Academy than the Southside and the Academy under comparable circumstances. [2499]

Q. (By Mr. Westbrook): Did the traffic pattern as it existed in 1950 and 1951 in that area have anything to do with your opinion in that respect?

A. Yes, certainly, because the main flow in an easterly and westerly direction, as I have indicated, is along Manchester Boulevard, which is immediately adjacent to the Academy, and very closely adjacent and well connected to the location of the Paradise, whereas the Southside, trafficwise, is somewhat more remote, out Vermont and down around the corner and down to Imperial. Manchester is the heavily traveled artery in that area.

Q. Therefore, more flow of people between the Academy and the Paradise than between the Academy and Southside, is that right?

A. That is correct.

United States
Court of Appeals
for the Ninth Circuit

FOX WEST COAST THEATRES CORPORA-
TION, TWENTIETH CENTURY-FOX
FILM CORPORATION and LOEW'S, IN-
CORPORATED, Appellants,

VS.

PARADISE THEATRE BUILDING CORPORA-
TION, Appellee.

PARADISE THEATRE BUILDING CORPORA-
TION, Appellant,

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TION, TWENTIETH CENTURY-FOX
FILM CORPORATION and LOEW'S, IN-
CORPORATED, Appellees.

Transcript of Record

In Six Volumes

VOLUME V.

(Pages 1905 to 2388, inclusive)

Appeals from the United States District Court for the
Southern District of California,
Central Division

No. 15424

United States
Court of Appeals
for the Ninth Circuit

FOX WEST COAST THEATRES CORPORATION,
TWENTIETH CENTURY-FOX
FILM CORPORATION and LOEW'S, INCORPORATED,
Appellants,

vs.

PARADISE THEATRE BUILDING CORPORATION,
Appellee.

PARADISE THEATRE BUILDING CORPORATION,
Appellant,

vs.

FOX WEST COAST THEATRES CORPORATION,
TWENTIETH CENTURY-FOX
FILM CORPORATION and LOEW'S, INCORPORATED,
Appellees.

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(Testimony of Cecil L. Dunn.)

Mr. Corinblit: Your Honor, I must object to this question as completely speculative. We have got two streets, Manchester and Vermont, and two streets, Manchester and Sepulveda, and this witness, without any foundation, is talking about something being easier and harder. There is just no foundation for any such conclusion. A street is a street. One thing is around the corner and the other thing is around the corner. I will object to the question as no foundation laid.

The Court: Objection overruled. [2500]

Q. (By Mr. Westbrook): Where is the South-side Theatre located?

A. Vermont and Imperial.

Q. Not on Vermont and Manchester?

A. No, of course not. I am sorry. Did I say that?

Q. I don't believe so. I think counsel did.

A. I said out Vermont and around the corner and down to Imperial.

Q. Have you made any effort in the course of your study to determine the effect of varying degrees of competition, or, putting it another way, varying degrees of loss of patronage upon the results achieved by the Academy Theatre?

A. Yes, I have.

Mr. Westbrook: My attention is called to the fact, your Honor, that I neglected to offer this La Tijera day and date versus exclusive run comparison in evidence.

The Court: It may be received in evidence.

(Testimony of Cecil L. Dunn.)

Mr. Westbrook: That would be Joint Distributor Defendants' Y-5.

The Clerk: Y-5.

(The exhibit referred to was received in evidence and marked as Joint Distributors' Exhibit Y-5.)

Q. (By Mr. Westbrook): Now, Mr. Dunn, if you were to assume a 20 per cent loss in patronage in the Academy Theatre—first of all, let me interrupt. [2501]

Mr. Westbrook: Counsel, it was stipulated the other day that the Academy Theatre's profit during the one-year period concerned with here was \$44,000.

Mr. Corinblit: I believe that is correct.

Q. (By Mr. Westbrook): If you were to assume a 25 per cent loss of patronage to the Southside Theatre, I would like to consider with you the——

A. My comparison, Mr. Westbrook, or my study of theatre grosses relates to the Academy, not the Southside.

Q. I'm sorry. Excuse me. I meant to say the Academy. A. Yes.

Q. Assuming that 25 per cent figure that I mentioned yesterday in loss of patronage to the Academy, I would like to go through the results of that loss of patronage in terms of profit with you.

A. Yes.

Q. The figure placed in evidence the other day for the gross of the Academy during this period of time was \$197,600. A. Yes.

(Testimony of Cecil L. Dunn.)

Q. The figure of gross and film rental. Now, the film rental figure was \$88,141. If you assume a 20 per cent loss in patronage, how would that figure be affected? A. 20 per cent or 25 per cent?

Mr. Corinblit: Excuse me, your Honor. I object to this as being totally argument. There is no foundation for a [2502] loss of 20 per cent patronage at the Academy. Mr. Westbrook is saying assume, and I don't know. Maybe we can go into a broad argument like this on 20 per cent, 25 per cent or 100 per cent. There is no foundation laid and it calls for a conclusion. * * * * * [2503]

The Court: Objection overruled.

Q. (By Mr. Westbrook): You mentioned that you had a 25 per cent computation.

A. 20, 25, or 30, whatever you want.

Q. Let's take 25 per cent.

A. 25 per cent. All right. 25 per cent of the gross revenue, there would be \$49,400, and a similar adjustment in the film rentals would be \$22,035.

Q. Excuse me, Mr. Dunn. I should put down over here the totals after the 25 per cent deduction.

A. The total after the 25 per cent would be \$148,200 [2504] gross revenue.

Q. And the film rental after—

A. After adjustments would be \$66,106, so that the revenue, after the adjustment, I mean revenue after deduction of film rental, after these 25 per cent adjustments, would be \$82,094, instead of the \$109,459 actually realized. The difference between 82,094 and 109,459 is \$27,365.

(Testimony of Cecil L. Dunn.)

Q. You are going a little fast for me, Mr. Dunn.

A. I'm sorry. \$27,365.

Q. Now, what percentage of profit of the Academy Theatre——

A. That is the net loss in dollars, but that represents 62½ per cent of the Academy's profit of \$44,000, so you lose 25 per cent in patronage and 62½ per cent, or two and a half times as much in profit.

Q. Now, are there any other factors based upon your experience as an analyst of competitive problems that should be brought to bear on this type of answer, that is the effect of competition upon a going business enterprise?

A. Yes. This is just a straight line adjustment, assuming that you lose this patronage and that much profit and nothing else would happen. But actually, of course, a lot of other things would happen. If the management began to see its profits vanishing at this rate, the first thing that it would try to do would be to cut expenses, and when it started to cut expenses, one of the first things that would suffer probably would be film rentals, which means that they would be in a less advantageous position to bid for the better pictures, and as they downgraded the character of their pictures the gross would fall off and they would get into the famous descending spiral which probably in a very relatively short period, in the absence of some extremely determined action on the part of the man-

(Testimony of Cecil L. Dunn.)

agement, would probably carry the profits down even more rapidly than has been indicated here.

That, of course, is typical of the declining stage of a business in general.

Mr. Westbrook: I would like to offer this analysis of the Academy's assumed 25 per cent loss of patronage in evidence as Joint Distributors' Exhibit Y-6, your Honor.

Mr. Corinblit: Same objection, your Honor.

The Court: Same ruling. In evidence.

(The exhibit referred to was received in evidence and marked as Joint Distributors' Exhibit Y-6.)

Mr. Westbrook: I have no further questions. You may cross examine.

Mr. Corinblit: Thank you.

The Court: Mr. Corinblit, it is 10 minutes to 11:00 and probably we should postpone the cross examination until after the morning recess.

Mr. Corinblit: Yes, sir. [2506]

The Court: Ladies and gentlemen of the jury, we are about to take another recess. Again it is my duty to admonish you you are not to discuss this case with anyone, you are not to allow anyone to discuss it with you, you are not to formulate or express any opinion as to the rights of the parties until this case has been finally submitted to you.

With that admonition, we will now recess until five minutes after 11:00.

(Recess.) [2507]

(Testimony of Cecil L. Dunn.)

The Court: Do you stipulate the jury are present and in the jury box?

Mr. Corinblit: Yes, your Honor.

Mr. Westbrook: So stipulated.

Mr. Corinblit called my attention to the fact that I had not offered in evidence the work sheets showing the day and date exhibitions between the Paradise and other theatres, which I would like now to offer as Joint Defendant Distributors' Exhibit Y-3-A.

The Court: In evidence.

(The document referred to was marked Joint Distributors' Exhibit Y-3-A, and received in evidence.)

Mr. Westbrook: Then also there is the work sheet on the Paradise and Academy analysis on three comparable pictures which I would like to offer as Exhibit Y-3-B.

The Court: In evidence.

(The document referred to was marked Joint Distributors' Exhibit Y-3-B, and received in evidence.)

The Court: You may proceed.

Cross Examination

Q. (By Mr. Corinblit): Mr. Dunn, my first group of questions are directed to the question of your qualifications to give the answers you gave today.

I want to ask you a few questions in that regard. Would [2508] you give me a list of the theatre

(Testimony of Cecil L. Dunn.)

companies for whom you have prepared market surveys in connection with theatres being built in the Los Angeles area?

A. I have never made a market survey of a theatre which was going to be built in the Los Angeles area.

Q. Would you give me a list of the—assuming a theatre was going to go into a given market, would you give me a list of the location surveys that you made for the purpose of determining where in a given area a theatre was going to be located?

A. I never made a market survey specifically aimed at a theatre as such.

Q. All right.

A. But I have made market surveys for areas in which theatres and other enterprises were comprehended as a matter of the total plant.

Q. But you never worked for a theatre company, is that right? A. No, sir.

Q. Now, incidentally, since 1951 have you worked for O'Melveny and Myers?

A. No, sir.

Q. The last time you worked for O'Melveny and Myers was in the 1951 case—in the Baldwin case?

A. That is correct. [2509]

Q. Before you worked for them you worked in the Markoy case, is that right?

A. That is right.

Q. What firm employed you there?

A. Loeb and Loeb.

Q. That is the defense counsel in this case?

(Testimony of Cecil L. Dunn.)

A. That is right.

Q. And before you were working for Loeb and Loeb, you worked for Mr. Gene Williams of Freston & Files? A. That is right.

Q. That was in connection with the Shorak case?

A. I think that was involved—I always identified it by the name of the theatre.

Q. The Puente Theatre? A. Right.

Q. And those were defense counsel?

A. That is right.

Q. Really what you have done in the motion picture business specifically is prepare studies for defense counsel in litigation, isn't that right?

A. That is right.

Q. And you have never yourself worked for a theatre company, a theatre operator in making marketing or marketing surveys?

A. That is right. [2510]

Q. Now, I take it the same thing is true—you have never worked for a distributor in trying to work out a market survey as to how he should distribute his pictures? A. That is right.

Q. And that was true during the entire period of your experience? A. Quite.

Q. All right. Now, would you then change the designation of your work in this connection with this case as a litigation specialist rather than a marketing specialist? A. No.

Q. You wouldn't? A. No.

(Testimony of Cecil L. Dunn.)

Q. Your work is only in connection with litigation, though?

A. It is market analysis and whether it is used in litigation or not is immaterial.

Q. But you have only done it for litigation for the theatre industry?

A. In the theatre business, right.

Q. Now, as a matter of fact, you have only done it for three firms? A. That is right.

Q. And they are all defense firms?

A. That is right. [2511]

Q. You have never done it for a plaintiff firm?

A. No.

Q. All right. Now, when you gave your opinions on this matter of substantial competition, for example, Mr. Dunn, did you take into consideration any of the opinions of the people, responsible people of the motion picture companies who were responsible for distributing pictures out here in the Los Angeles area?

A. No, sir. I was employed to do an entirely independent piece of work, bringing my specialty to bear, rather than the opinions of the theatre people per se.

Q. So if a man who had 30 years' experience in the industry distributing Paramount pictures in this territory were to say in these words: "By no stretch of the imagination do we feel that the Paradise is competitive to the Southside," the man who was responsible for the distributing of Paramount

(Testimony of Cecil L. Dunn.)

pictures, if he were to say that that wouldn't affect your opinion? A. Not in the least.

Q. As a matter of fact, if all of the major distributors were to get on the witness stand and state, men who had spent 30 or 40 years in the business and all of them said, "By no stretch of the imagination would the Paradise be deemed competitive to the Southside," that still wouldn't affect your opinion? [2512] A. Not at all.

Q. Now, I think you testified that there was quite a distinction between a theoretical economist and the kind of thing you do, is that right?

A. Yes, there is.

Q. That is these people work in theories and you work with practical facts, is that right?

A. I think that is right, yes.

Q. Now, one of the things you said yesterday was, I think, that in talking about it generally, what would be good business for distributors using an exclusive policy of some kind, if they could do that, that would bring more profit to a distributor. Is that right? Is that one of the things you say today?

A. Yes, I think in general I indicated that was the case. [2513]

Q. Now, do you have your work sheets on the profits on pictures by any of the distributors in this case? Do you have any work sheets on that?

A. No, I don't.

Q. You don't have any work sheets at all?

A. No.

(Testimony of Cecil L. Dunn.)

Q. Do you mean you have never seen the profits of a distributor on a picture sold in the Los Angeles area? A. Yes, I have.

Q. Where are those work sheets?

A. I do not have them available.

Mr. Westbrook: Counsel, as you know, the sheets showing the national film rentals and the Los Angeles exchange territory rentals are right in the files here.

Mr. Corinblit: I know that, Mr. Westbrook. Mr. Dunn said profits. He didn't say gross receipts. He said profits.

The Court: Don't argue with counsel now.

Mr. Corinblit: Yes, sir.

The Court: You are cross examining this witness, not cross examining counsel.

Q. (By Mr. Corinblit): Mr. Dunn, do you have your work sheets showing the profits that Loew's, for example, realized on any pictures in this area?

A. I have never made any work sheets calculating the [2514] profits of Loew's.

Q. Have you ever seen—— A. Surely.

Q. ——the net profit Loew's realized on a particular picture?

A. On a few, yes, from time to time.

Q. What pictures did you see?

A. I can't recall offhand, Mr. Corinblit, any particular picture made by Loew's. As a matter of fact, I can't even say that I am sure that I have ever seen a summary of Loew's profits on a particular

(Testimony of Cecil L. Dunn.)

picture. I have, however, seen them on the pictures made by other producers.

Q. The profits? A. Right.

Q. Picture by picture in this case?

A. No, not in this case.

Q. Did you see them in other cases?

A. No. As a matter of fact, the occasions on which I have had access to that information have not been related to litigation of this kind.

Q. Not related to litigation at all?

A. That's right.

Q. You know there has been testimony in this case that after we filed this lawsuit a number of film companies have gone to multiple day and date, don't you? [2515]

A. No, I don't know that.

Q. You don't know that?

A. No. I haven't reviewed the balance of the testimony in this matter, Mr. Corinblit. I have been concerned primarily with my own.

Q. Do you know whether or not since 1951 every single film company has gone to multiple day and date policy? Do you know that, one way or another?

A. No, I don't know that. I have seen some evidence of some changes of this character, but, Mr. Corinblit, I do not know, I do not follow the motion picture industry day by day, week by week, or even year by year.

Q. I understand that, Mr. Dunn. I am trying to

(Testimony of Cecil L. Dunn.)

find out the facts. You testified you are a man who deals in facts, and I am trying to get the facts.

A. But I deal with the facts which are germane to the conclusion I am trying to reach, and not the whole ambit of facts in the motion picture industry which may or may not be related to the thing I am trying to test.

The Court: May I interrupt?

Mr. Corinblit: Certainly.

The Court: I thought I understood you to say it is your opinion a single run first run was better for the distributors.

The Witness: I am definitely of that opinion.

The Court: That is what I thought you said.

The Witness: Surely.

Q. (By Mr. Corinblit): But that was not based——

A. I said there would be certain circumstances in which that could be modified.

Q. We will get to the modification.

A. I am sure we will.

Q. But what I am asking you is whether when you made that statement you had ever made a comparison of what these companies had determined when they went to the alternate policy?

A. No.

Q. You never had seen those figures?

A. No. Completely innocent.

Q. Did you use the word innocent?

A. Yes.

Q. To get clear this degree of innocence, Mr.

(Testimony of Cecil L. Dunn.)

Dunn, not only have you never done any work for theatre companies other than in defense litigation, but you have never owned a motion picture theatre?

A. Happily, no.

Q. You said happily, no? A. Yes.

Q. I take it you have never bought or booked motion pictures. [2517]

A. Right. The word innocent still applies.

Q. You know what the work booking means.

A. Surely.

Q. You have never operated a motion picture theatre. A. No.

Q. I think you have testified that in prior litigation you don't go to movies much.

A. Not very often.

Q. That has been true for a long time, you do not go to movies?

A. I have gone to more of them since drive-ins became available.

Q. Before 1951, you didn't go to movies very much? A. No, not very much.

Q. And when you gave your opinion that it would be better business to have an exclusive as against a multiple day and date, I think you went to the blackboard? A. That's right.

Q. And drew this picture here?

A. That's right.

Q. Now, let's see if I can remember what this picture shows. A. May I tell you?

Q. Yes. First, I want to start with something up here. [2518] A. All right.

(Testimony of Cecil L. Dunn.)

Q. This is \$2.00. A. That is \$2.00, yes.

Q. And you start out with this long column.

A. That represents \$2,000 derived from a thousand people who are willing to pay \$2.00 apiece to see first run exhibition.

Q. First run? A. Right.

Q. Let's stop right there, Mr. Dunn. What were the first run theatres charging in 1951 in Los Angeles? A. I haven't the vaguest idea.

Q. You haven't the remotest idea of that?

A. No.

Q. And you don't know what they are charging now, do you?

A. The last time I went to a first run theatre, what did we pay? \$1.85, I think, something like that.

Q. This figure of \$2.00 could have been \$10, couldn't it, it could have been that, \$10 easily, just as well.

A. Might better have been 50 cents, but as long as the relationships remain the same, the principle is valid.

Q. We will get to those relationships. So that this figure of \$2.00, that figure you kind of cooked up, would you say, as an example? [2519]

A. That's right.

Q. And this figure down here was \$1.00?

A. \$1.00, that's right.

Q. A dollar for— A. 4,000 people.

Q. 4,000, and this figure of 50 cents, how many people? A. 10,000.

(Testimony of Cecil L. Dunn.)

Q. 10,000 people.

A. Down below there, yes.

Q. So this whole answer—let's go through the answer. You said there would be 1,000 people who would give 2,000. A. That's right.

Q. And 4,000 people, and from them you would get \$4,000? A. Yes.

Q. And 5,000 at 50 cents?

A. 10,000 people at 50 cents.

Q. 10,000 people at 50 cents, would be \$5,000, a total of 11. A. Right.

Q. But instead of having that policy, if you had a policy across the board here of 50 cents and you had the same number of people——

A. Right.

Q. ——the distributor would get \$7,500? [2520]

A. Right.

Q. And the net loss to the distributor would be 3,500. A. Right.

Q. When you gave those figures, of course, you said you didn't know what they charged in Los Angeles in 1950 and 1951. A. Right.

Q. You said you didn't know if they were charging a dollar or more or less. A. Right.

Q. And you hadn't any idea about this 50 cent figure here? A. None at all.

Q. Let's suppose that in fact when they played—let's suppose as follows. In the first place, the first run price actually charged in Los Angeles was about 70 cents, let's suppose that for a minute.

A. All right.

(Testimony of Cecil L. Dunn.)

Q. And suppose when everybody went to multiple day and date down here—how many people are there involved altogether? A. 15,000.

Q. 15,000. Suppose that they all charged 70 cents in that group, just as the one theatre has been charging 70 in [2521] the prior group.

A. That is a complete negation of the principle that is involved.

Q. Let's leave the principles for a moment. Let's take the facts. Let's talk about the facts.

A. All right, let's talk about the facts. That is a complete negation of the principle——

The Court: May I suggest that the witness not argue with counsel.

The Witness: I beg your pardon.

The Court: Your province is to answer questions.

The Witness: But counsel is making an invalid assumption there.

Q. (By Mr. Corinblit): Do you think when I make the assumption that the first run theatres, when they went multiple day and date charged substantially the same admission price, it is invalid?

A. Counsel, you are talking about something which is not illustrated by that diagram, and you are talking about a contrast between an exclusive first run and a multiple day and date run.

Q. Yes.

A. All right. You can't illustrate that with that diagram.

Q. Isn't that what you were trying to show?

(Testimony of Cecil L. Dunn.)

A. No, sir.

Q. I thought you were trying to show how good business it would be for the exclusive first run.

A. Yes.

Q. That is in comparison with what? That is better business than what?

A. That is in contrast with this business of distributing the whole picture right across the board in all the theatres that wanted to take it at the lowest price.

Q. But you don't mean necessarily multiple day and date, is that it, in other words, they would be staggered?

A. You will have to clarify that question.

Q. I will try to clarify it. You were saying if you had an exclusive first run on this basis it would be better business for a distributor than if he played on some other basis.

A. That's right.

Q. I want to know what the other basis was.

A. The illustration there is giving it to enough theatres to produce total patronage of 15,000 people at 50 cents.

Q. Then all this is is arithmetic. You have multiplied a thousand by two, and 4,000 by one, and 10,000 by 50 cents, or whatever it is, that is what you have done, isn't that right?

A. No. I have given the illustration of what happens in [2523] any market in which the product has a sufficient degree of exclusiveness to permit the marketing of it in successive stages.

Q. So, Mr. Dunn, you have used this as a basis

(Testimony of Cecil L. Dunn.)

for what you think would be better business for a distributor, as far as he is concerned, on exclusive first run, is that right? A. Right. [2524]

Q. Now, when you compared the exclusive you compared it to something that is non-exclusive?

A. That is right.

Q. Now, the non-exclusive is multiple day and date, isn't it? A. (No answer.)

Q. Isn't that what it means?

A. Perhaps so, yes.

Q. Let us take it that way then. You compared a situation where if you had spent two dollars for 1000 people you would get and so forth on down the line, you would get these figures?

A. That is right.

Q. But your comparison would not work. Let us put it in a mild way. Your comparison wouldn't work if on the multiple day and date the theatres playing charged the same admission price as they charge regularly for first run, isn't that right—it wouldn't work? A. Oh, not at all.

Q. You say it wouldn't work?

A. It would work. It would work. Of course, what you would have if you were going to play multiple day and date in lieu of first run——

Q. Charging the same admission price.

A. ——charging the same admission price. What you then [2525] would be stabbing at would be the column on the left-hand side of the diagram, where the admission price would be lower and where the

(Testimony of Cecil L. Dunn.)

number of persons attracted would be larger and where the total revenue would be the same.

Q. All right. In other words——

A. Then you go on.

Q. Let us stop there.

A. To your successive steps downwards. In other words, what you are proposing, counsel, is to use not a single theatre with an exclusive first run, but a variety of theatres in which perhaps you can get the same number of seats by charging a lower price. The principle is exactly the same.

Q. In other words, it would come out even on that basis, is that right?

A. No, no, no, you wouldn't because unless you have 100 per cent saturation, unless you are content with your first multiple first run revenues and only then you have to go on to successive runs and still seek the people—the seats that can be sold at lower prices and on wider distribution and unless you do that you are not maximizing the revenue from the picture.

Q. Well, we can do that, Mr. Dunn, either on your theory or the other theory?

A. Surely, you can draw another diagram if you would [2526] like in which the first column would be the short, fat and wide and then below the short, fat and wide column you have some more shorter, fatter and wider columns. But the principle of marketing in successive steps is just as valid under the assumption of a single exclusive first run as under the assumption of a multiple first run.

(Testimony of Cecil L. Dunn.)

Q. And looking at first run only, it is perfectly possible to get just as much revenue out of a group of first runs as you get on the one first run if they charge the same admission price?

A. Theoretically, yes.

Q. Now, I want to turn from theory to facts. Suppose on the first run you only had 2000 seats on the exclusive?

A. Right.

Q. And suppose on the multiple day and date you had 50,000 seats. You would get more money out of the multiple day and date first run than you would get out of the exclusive first run?

Mr. Westbrook: Are you assuming the same length of run?

Mr. Corinblit: Sure, one week.

The Witness: That isn't the way it works.

Q. (By Mr. Corinblit): Let us talk about a week's first run, Mr. Dunn.

A. If you have 2000 seats in the exclusive first run [2527] and 50,000 seats in the multiple first run, you obviously have to charge a lower price for the 50,000 seats than you do for the 2,000-seat exhibition.

And if you have 50,000 seats in your multiple first run, you have wiped out a very substantial portion of the successive steps of revenue which you can get by using the exclusive first run.

Q. Now, that is all theory on your part, isn't it?

A. Not at all.

Q. You haven't seen—I asked you before, Mr. Dunn,—you know that in this field these companies,

(Testimony of Cecil L. Dunn.)

every one of them has gone to multiple day and date. They have gone to multiple day and date, every single one of them. They have done it for the last two or three years.

Mr. Mitchell: I object to this as argumentative, and it is not in accordance with the fact when he states those things to the witness and requires the witness to answer on the basis of his statement. It is improper. It is not correct.

The Court: This witness made the statement on direct examination that he thought it was preferable to have an exclusive first run.

Mr. Mitchell: I am not objecting to his cross examination but I am objecting to his statements.

The Court: As I explained to the jury the opinion of an [2528] expert witness is no better than his reasons for the giving of the opinion.

I think this is proper to attempt to show what reasons he had to make that sort of statement.

Mr. Mitchell: I am in complete agreement with your Honor. It is perfectly proper, but what he is doing is making a statement, your Honor, which is contrary to the facts and to make such a statement and ask the witness to answer on the basis of that statement is assuming facts not in evidence.

I am objecting to the form of the question and not to the cross examination.

The Court: All right. Do you object to the statement that all the distributing companies now are using multiple first run?

(Testimony of Cecil L. Dunn.)

Mr. Mitchell: Yes. That is not a correct statement.

The Court: What is the correct statement?

Mr. Mitchell: The correct statement is that they are using some multiple first run and they are using the showcasing of pictures. They are using both.

The Court: May I ask the witness a question. What do you understand by "multiple first run"?

The Witness: Well, multiple first run I would understand would be the initial exhibition of a picture in a market area in several theatres rather than in one. [2529]

The Court: Would you consider, or would it be your opinion or your conclusion if a picture showed in downtown Los Angeles and at the same time showed out on Wilshire Boulevard, that would be a multiple first run in your opinion?

The Witness: Yes. I can see a few reasons why a policy of multiple first run is perfectly logical in the Los Angeles metropolitan area — traffic and parking are two of the major things that would come to my mind. And the growing competition between the motion picture industry and other types of entertainment which I think has made people far less willing to go afield to seek motion picture entertainment than used to be the case.

One factor in point is I would not regard it as illogical at all considering the vast geographic expanse of the area comprehended by the Los Angeles market. It would be a pretty good policy to have multiple first run of certain kinds of pictures as-

(Testimony of Cecil L. Dunn.)

suming that those multiple first runs were logically geographically distributed in what I described the other day as your regional marketing centers. I can see a lot of sense in that.

The Court: Then I suppose you would like to modify your opinion?

The Witness: Not at all. My opinion is just exactly the same. Look, there isn't the slightest difference—may I address myself to the map again. There isn't the slightest [2530] difference between an undertaking to show a picture on a multiple first run basis in let us say Pasadena, Glendale, Beverly Hills and downtown in here somewhere, and perhaps simultaneously in downtown Los Angeles and in Hollywood with an effort to get the maximum number of people into this relatively high priced first column. And the reasons why you do that are I think, in existing circumstances, self-evident.

More people will go to Hollywood from this area than will go to downtown Los Angeles. More people will come into the Pasadena area from out here than will go to downtown Los Angeles or even Hollywood and so on.

But the principle which is involved is exactly the same. On your multiple first run deal you are making one step in the direction of this convenience type of distribution but you are still skimming the cream, you are still trying to get this first high priced paying group, the people who are willing to

(Testimony of Cecil L. Dunn.)

and who enjoy motion pictures exhibited under those circumstances.

But any exhibitor who stops with a multiple first run and says this is the totality of the revenue which I can get out of this picture in the Los Angeles market, has either had a disaster with the picture or else he is throwing away money which he could get.

Mr. Corinblit: Thank you very much, Mr. Dunn.

The Court: Then you think as far as the distributor is concerned, it is perfectly logical for them to go to multiple first run policy?

The Witness: It is proper for them to go to multiple first run policy as long as it bears a rational relationship to the economics—the geography of the market. If a distributor decided “All right, now, I am going to have multiple first run on four theatres on adjacent corners,” why, it wouldn’t make much sense, but as long as he is making a rational interpretation of the information about the market which is available to him, if he is studying population distribution, traffic patterns, ease of traffic flow, convenience of movement and all of that sort of stuff, multiple first run could conceivably be a pretty good idea.

Q. (By Mr. Corinblit): Now, let us just carry that one step further in this rational examination of the market.

I suppose it would be perfectly rational to have—incidentally, you could have as many as 11 and be rational if you circumscribe this whole area—that

(Testimony of Cecil L. Dunn.)

would be all right, wouldn't it, five or six would be all right? A. Oh, sure.

Q. Eight or nine would be all right?

A. Well, if we are going to be precise, let us count them.

Q. All right. In other words, you would have one out [2532] here in, certainly, the Valley?

A. I would say so, yes.

Q. And you could have one in the Pasadena area? A. Right.

Q. Huntington Park area?

A. I am less familiar with that.

Q. Huntington Park is out here.

A. Probably.

Q. You could have one maybe down here in this Watts-Willowbrook area?

A. Not first run, sir.

Q. How about the Inglewood area? That is all right, isn't it? A. Oh, probably.

Q. Beverly Hills is all right?

A. Oh, certainly.

Q. You might go to West Los Angeles—that might be all right? A. I doubt it.

Q. How about Santa Monica?

A. Very doubtful about that.

Q. But other than those——

The Court: You haven't mentioned Glendale.

Q. (By Mr. Corinblit): How about Glendale?

A. Marginal. [2533]

Q. Glendale is one of those regions you mentioned?

(Testimony of Cecil L. Dunn.)

A. That is right, but it is marginal insofar as first run theatres go.

Q. This is one of the regions that you mentioned. Wouldn't that take a first run?

A. I am not saying that. I am saying it is marginal.

Q. Could go either way?

A. The natives of Glendale, of whom I happen to be one, have a horrible tendency to stay at home at night.

Q. I see. All right. I think you gave, Mr. Dunn, a very comprehensive explanation of the fact. What you are doing in part on these multiple day and date runs, you are really carrying out the facts of life in this Los Angeles area by distribution of population, transportation and so forth?

A. Right, just exactly.

Q. And the ease—in other words, people might not be willing to go downtown and pay parking tickets, pay for parking and pay the admission price, but they might if they are out in Pasadena, they might be willing to go to a first run theatre there where they could park on the street or somewhere else?

A. Right.

Q. And in Inglewood, they could do the same thing, people would be much more likely—more people would be [2534] more likely to go there than to go into Hollywood or downtown?

A. Yes.

Q. Now, incidentally, in this—what you have testified to now is after you are through with these eight, nine, ten or eleven first runs—do you know

(Testimony of Cecil L. Dunn.)

how many theatres there are in the Los Angeles area? Have you any idea how many there are?

A. I have heard, but the number escapes me.

Q. What have you heard?

A. I wouldn't want to quote you a figure. It is a large number.

Q. All of these dots here are theatres?

A. Oh, yes.

Q. All the little blue patterns?

A. I am familiar with that.

Q. They are all theatres?

A. They are all theatres.

Q. So you have lots of theatres when you are all through with which to start out and get your cheaper price or revenue, isn't that right?

A. That is right.

Q. Lots of theatres so you could continue on the same process you described?

A. (No answer.)

Q. Now, Mr. Dunn, another thing I think you said [2535] yesterday was if you were going to pick a location of a theatre in the Inglewood-Westchester area you would spot the Academy right where the Academy is? A. That is right.

Mr. Corinblit: And incidentally, counsel, I notice you did not offer in evidence the two-mile circle map.

Mr. Westbrook: It is in evidence, counsel.

Mr. Corinblit: It is?

Mr. Westbrook: Yes.

(Testimony of Cecil L. Dunn.)

Mr. Corinblit: I am sorry. I wonder if I can take a look at it for a minute, please.

Mr. Westbrook: Exhibit Y-1.

Mr. Corinblit: Y-1 in evidence.

Q. Before I go to that, Mr. Dunn, there is one other question I should ask you in the light of this convenience factor that we have mentioned about getting people into the higher—into multiple first runs.

There is a good chance, isn't there, that you will get more people, total people into that multiple first run than if you have it exclusive?

Mr. Westbrook: During what period of time?

Mr. Corinblit: '50 and '51, during one week or two weeks.

Mr. Mitchell: He hasn't been talking about '50 and '51. He has been talking about multiple runs in 1956. [2536]

Mr. Corinblit: This witness has described multiple runs as being two theatres and the record shows that there have been two theatres playing multiple first run in this city since 1934, so I am talking about 1950 and '51.

The Witness: Counsel, to answer your question whether or not you have got more people in would depend among other things upon the price.

Q. (By Mr. Corinblit): Assuming the price—let us assume the same price, you are more likely——

Mr. Mitchell: Same price as what?

Mr. Corinblit: We have one theatre on exclusive

(Testimony of Cecil L. Dunn.)

charging one dollar—all theatres charge one dollar—these multiple theatres around here I think we have had testimony——

The Witness: No, I don't think that follows at all.

Q. (By Mr. Corinblit): What follows?

A. I don't think it follows if all of a sudden you convert a bunch of neighborhood theatres that have not been charging a dollar or community theatres or something who have not been charging a dollar in the way you have described as theatres with multiple first run and jack the prices up to a dollar, you are not going to increase the patronage in the same proportion.

Q. Not in the same proportion but you are going to get more people into 11 theatres than you are going to get into one downtown or one Hollywood theatre, isn't that right? [2537]

Mr. Mitchell: Over what period of time?

Mr. Corinblit: For one week, for one week.

Mr. Mitchell: That doesn't make a comparison of exclusive runs for months. To compare months of run on an exclusive run with one week multiple run is an invalid comparison.

The Court: Objection overruled.

The Witness: I don't think so. I am not in a position to answer that, but it doesn't seem to me it necessarily follows.

Q. (By Mr. Corinblit): You have got 2,000 seats on first run for a week and now you have got 11 theatres playing first run at the same time, and

(Testimony of Cecil L. Dunn.)

as you have just testified, all this convenience comes into play, and a patron out here doesn't have to go downtown. He has now got a theatre within two blocks playing first run where he can go. A patron in Pasadena or in Glendale has now got a theatre that he can go to that is playing first run. You are going to get more people in all of those theatres, aren't you?

A. And probably fewer downtown.

Q. And probably fewer downtown, but the overall is certainly going to be much larger—you don't have any doubt about that, do you?

Mr. Mitchell: Over what period of time?

Mr. Corinblit: One week, one week. [2538]

The Witness: Yes, I have some doubts about that.

Q. (By Mr. Corinblit): You have doubts about that.

A. Yes.

Q. But again, you haven't seen the figures.

A. Counsel, I studied the patronage pattern in a number of downtown Los Angeles theatres in connection with some of these prior cases to which you have alluded.

Q. Yes.

A. And not even the distributors, by whose attorneys I had been retained for that purpose, were willing to believe the data which showed that those theatres, which at that time were playing downtown first runs, were as underpopulated as they were. This was in 1950 and 1951, too, and there was a great dearth of patronage in many of those in-

(Testimony of Cecil L. Dunn.)

stances. I would assume, therefore, that the multiple first run policy which you described would certainly have that effect. All you would be doing, I would think, would be splitting up what I described yesterday as the \$2.00 people, and you may call it the dollar people, if you like, but that would be splitting up the \$2.00 people among the various theatres at which the picture was available.

Sure, on a convenience basis, you might get some more, but it is not going to be a straight proration of the number of seat days by no means.

Q. All right. But it is going to be a substantial increase [2539] in the total number of people.

A. I wouldn't even say that. I think it is more apt to be a splitting up of the total first run patronage.

Q. So that if one week a theatre downtown was doing \$10,000 a week, it is your opinion that on multiple day and date for that first one week, for that one week it would be about \$10,000 a week?

A. Oh, no, that is precisely the opposite of what I said.

Q. How much would it be in comparison, sir, one week?

A. One week would depend upon the number of other theatres that played competitive with it.

Q. Let's assume 11 theatres spotted just as we indicated, for convenience purposes, for the public patronage, all around the area. What would be the comparison, assuming \$10,000 in one week down-

(Testimony of Cecil L. Dunn.)

town exclusive, what would you have to the one week?

A. In 10 theatres?

Q. Yes.

A. I am in no position to make an estimate, but it wouldn't be substantially larger.

Q. Wouldn't be substantially larger?

A. No, I don't think so.

Q. Would you change your opinion, Mr. Dunn, if I told you that \$100,000 in one week has happened on multiple day [2540] and date?

A. I would regard myself as better informed, yes, but I would then have to know what picture it was and the circumstances in which it played, and so on. I wouldn't accept that as a general conclusion.

Q. All right. Mr. Dunn, I think yesterday you said that you would locate a theatre where the Academy was.

A. That's right.

Q. You testified earlier you have never made a study.

A. Never done it before.

Q. You have never done that before. You just took a crack at it yesterday.

A. Not at all, because the principles which are involved in the location of theatres are precisely the principles which are involved in the location of any other kind of business establishment, given the nature of the product that you are selling.

Q. All right.

A. I wouldn't necessarily choose the same location for a hot dog stand that I would for a theatre, nor would I choose the same location, for example,

(Testimony of Cecil L. Dunn.)

of a public utility base, to mention the type of location I have done often.

The Court: But I understood your statement yesterday was that you would choose a location of a theatre even though another theatre was there.

The Witness: Well, I would certainly take into account the nature of the theatre that was there, the nature of the rest of the theatres that were there, the nature of the theatre that I proposed to construct, the kind of policy that I was going to pursue, and so on.

The Court: But that was not the question.

The Witness: All right, sir.

The Court: You said yesterday that you would select that particular location, and I asked you even though——

The Witness: I will stand on that, I would.

The Court: ——there was a theatre there, and you said yes.

The Witness: Yes, I would.

The Court: All right.

The Witness: I would expect to give the other fellow a tough time, but I would still make that choice.

Q. (By Mr. Corinblit): Now, Mr. Dunn, let me ask you a hypothetical question. Suppose you had an area outside of the urban core, a lot of wheat fields around it, the Westchester area. Suppose you were in 1945. There is a proposed development in the Westchester area. Would you put a first run theatre in there? A. No.

(Testimony of Cecil L. Dunn.)

Q. You wouldn't do it? A. No. [2542]

Q. You would probably advise a businessman not to do it if he asked you? A. Yes.

Q. I take it a lot of your advice isn't followed, is that right?

The Court: Well, he was never asked. There is no evidence that he was ever asked.

Mr. Corinblit: All right, your Honor.

The Witness: The only thing that I can say is that I have been re-employed by the same people many times.

Q. (By Mr. Corinblit): I am talking about the theatre business. You wouldn't have located a first run theatre where the Loyola Theatre is?

A. No.

Q. What would you say if I told you that the Loyola Theatre in 1948 earned a greater total profit than the Chinese Theatre on Hollywood Boulevard?

A. I wouldn't be surprised at all.

Q. You would not be surprised at all?

A. No.

Q. That wouldn't change your opinion at all? You still wouldn't advise a business man to locate a theatre in the Westchester area, even if they earned more money than the Chinese Theatre on Hollywood Boulevard?

A. Mr. Corinblit, you told me about wheat fields in [2543] Westchester. Actually it was oat hay.

Q. I beg your pardon? I didn't hear you.

A. Actually, I said, it was oat hay.

Q. Oat hay, I am sorry.

(Testimony of Cecil L. Dunn.)

A. You asked me if I would locate a first run theatre there.

Q. Yes. A. And I said I wouldn't.

Q. You wouldn't do it.

A. I certainly wouldn't. Now you tell me that after the theatre was built and a lot of parallel changes had taken place in the area, some changes made in distribution policy, and so on, that this theatre is making a lot of money. That doesn't surprise me.

Q. I don't know what distribution policy changed in 1945. Do you know of any change?

The Court: Mr. Corinblit, let's get some dates for this witness.

Mr. Corinblit: Yes, sir.

The Court: When was the Loyola Theatre built?

Mr. Corinblit: It opened its doors in October 1946.

The Witness: Still surrounded by hay fields?

Q. (By Mr. Corinblit): Well, you probably know the territory. Was it hay, or whatever you say it was? How would you describe it at that time?

A. It was oat hay at the time.

Q. Oat hay. All right. A. Yes.

The Court: Now, Mr. Corinblit, you said that the Loyola made more money than the Chinese. In what year?

The Witness: Yes, what year?

Mr. Corinblit: All right.

The Court: We are not talking about this year. What year are you talking about?

(Testimony of Cecil L. Dunn.)

Mr. Corinblit: I want to talk about 1948, two years after they opened. I wish I had the other figures, your Honor.

The Court: Your statement is in 1948 the Loyola made more money than the Chinese.

Mr. Corinblit: Yes, sir.

Mr. Mitchell: Of course, that isn't evidence, your Honor.

Mr. Corinblit: We will put that in right now.

The Court: All right. Let's get that in.

Mr. Corinblit: Let's get the evidence.

The Court: We are learning something about economics.

Mr. Corinblit: We will mark this plaintiff's exhibit next in order, the Loyola profit and loss statement for the years 1948, 1949 and 1950.

The Clerk: Exhibit 79 for identification. [2545]

The Court: It can go in evidence. I don't know why it can't go in evidence.

Mr. Corinblit: Yes, sir. We will offer it in evidence, your Honor.

The Court: 79 in evidence.

The Clerk: Exhibit 79.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit No. 79.)

Mr. Corinblit: We will next mark for identification and offer in evidence as plaintiff's exhibit next in order the profit and loss statement of the Chinese Theatre. I have, your Honor, on three sheets the

(Testimony of Cecil L. Dunn.)

period from 1940 to 1951. I will offer the whole thing in evidence.

The Court: In evidence.

Mr. Corinblit: Thank you, your Honor.

The Clerk: Exhibit 80.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit No. 80.)

The Court: Now you can tell the witness what the figures are.

Mr. Westbrook: May I see them first?

Mr. Corinblit: Certainly, and here are the Chinese.

Q. Mr. Dunn, I want to read to you these figures. The Loyola Theatre for the 12 months ending December 25, 1948, made a net profit—— [2546]

Mr. Westbrook: Will you also read the gross admissions?

Mr. Corinblit: Just a minute. You let me get the profit and then we will get the gross admissions.

\$142,056.68.

The comparable figures for the Chinese to December 25, 1948, \$120,653.97.

The Loyola Theatre made \$22,000 more than the Chinese in 1948.

In 1949, the Loyola Theatre had a net profit of \$134,985.

The Chinese Theatre had a net profit of \$122,477.91.

In excess of the Chinese, to the benefit of the Loyola, there was about \$12,000.

(Testimony of Cecil L. Dunn.)

In 1950, the Loyola had a profit of \$86,478; the Chinese Theatre for the same period had a net profit of \$52,436, so that the difference in 1950 is approximately \$32,000.

Q. Now, Mr. Dunn, would you change you opinion?
A. Not in the least.

Q. As to location.

A. Not in the least. Let me ask you a few questions, counsel.

The Court: I am sorry, but you cannot.

The Witness: Then let me give a longer answer.
I [2547] gave counsel a——

Mr. Corinblit: Your Honor, I don't know whether——

The Witness: I want to say why I wouldn't change my opinion.

The Court: Just a minute.

Mr. Corinblit: Yes, your Honor. I think the answer speaks for itself. I am sure Mr. Westbrook on re-examination will give Mr. Dunn full opportunity to argue the case, but I think the answer is sufficient.

Mr. Mitchell: Can't he explain his answer?

The Witness: I want to explain my answer, if I may.

The Court: Just a minute, please. Did you have something to say, Mr. Mitchell?

Mr. Mitchell: Is it not permissible that he explain the answer?

The Court: Yes, and Mr. Westbrook, were you getting up to say something?

(Testimony of Cecil L. Dunn.)

Mr. Westbrook: I didn't mean to get up at the same time Mr. Mitchell did.

The Court: You have answered the question yes. Do you want to explain?

The Witness: Yes. In the course of my direct testimony, I gave counsel an example of how you make a meaningful comparison between theatres. It involved such things as a measure of the comparability of the pictures that played in [2548] the two places, as measured by such things as the national rentals, and as measured by such things as the Los Angeles exchange territory rentals.

Whether or not the Loyola Theatre made a larger profit than the Chinese would depend to a considerable extent upon the availability of the pictures which were available to the two theatres.

Then, further, net profit as such is the function not only of the total amount of revenue you get, but the expenses which you incur in the course of your operation.

The Chinese has been known in Los Angeles from the time it was opened as a show case theatre where, I assume, the per seat expenses are relatively high.

The Loyola, although apparently for reasons not known to me was being used, at least at that time as a first run theatre, probably doesn't have the per seat operating expenses which are as high as those of the Chinese.

The mere fact, therefore, that it made a larger profit doesn't seem to me to be necessarily meaningful in this connection.

(Testimony of Cecil L. Dunn.)

The Court: May I ask——

The Witness: But to go back to the—Mr. Corinblit asked me first if given a group of hay fields in Westchester, I would choose that as a location for a first run theatre, and I said no, and now he comes up with some figures which show [2549] that after a theatre had been located there and given by its operators a first run policy, that it was in a period of three years more profitable than another theatre with respect to which he gives me no comparable data.

Then he asks me if I would change my opinion, and the answer is still no. If you give me corn fields, wheat fields or oats, I wouldn't locate a theatre in them. [2550]

The Court: May I ask a question?

When you said that you would locate a theatre at a certain spot, you were considering the question of profit, how much the theatre could make, isn't that right?

The Witness: That is right.

The Court: If you didn't think a theatre could make a profit you wouldn't recommend a location.

The Witness: That is right.

The Court: Even though it had a big gross.

The Witness: No, wait a minute. The question of a location is prospective. It gives an existing situation and says, "Will you go here?" Information developed after the fact. The fact that somebody did locate a theatre there and then being able to control its policy he was able to give it satisfac-

(Testimony of Cecil L. Dunn.)

tory availabilities which made it profitable. But that isn't germane to the question at all—not in the least.

The Court: What I asked you is this: When you come to locate a theatre the thing you are interested in is whether or not the theatre would make a profit.

The Witness: That is right. And I would gauge that estimate upon such things as the immediately available population, the potential movement of population, which would make the site of the theatre readily acceptable.

I would think about such things as competition with other theatres and so on. [2551]

The Court: Mr. Witness, I think Mr. Corinblit has some very interesting figures to submit to you.

All right, Mr. Corinblit.

Q. (By Mr. Corinblit): There are two things you said, Mr. Dunn. There were two things which you said that I thought might explain this Chinese-Loyola matter. The first thing you said was pictures, didn't you? A. That is right.

Q. Do you know that the Chinese and the Loyola played every single—played exactly the same pictures? A. No, I didn't.

Q. You didn't know that when you made that answer?

A. Look, Mr. Corinblit, you are asking me now, or, rather, you are talking now about a situation

(Testimony of Cecil L. Dunn.)

which existed after the time that you asked me to locate the theatre. You asked me about the location of a theatre in the middle of an oat field, and I said no.

Then you in your question said that somebody did locate a theatre there. All right. The theatre made money. The theatre made money because the oat field disappeared. You didn't give me that condition. You asked me if I would locate a theatre in the middle of an oat field, and now you are asking me whether or not I know anything about what has happened in the Chinese or in the Loyola or anything like that at any time after—that is, after the fact. You asked [2552] me about theatres in an oat field, and my answer was no. If you ask me about a theatre in some rational location——

The Court: Mr. Corinblit, unless you are going to show the witness an exhibit I suggest that you stay at the lectern.

Mr. Corinblit: I was about to show him an exhibit, but it doesn't matter because the witness is not familiar with the facts.

Q. (By Mr. Corinblit): But let me say this, Mr. Dunn, about this point. It is in evidence. At that time the evidence shows that the Chinese Theatre and the Loyola Theatre, since the day that the Loyola Theatre opened in 1949, have played the identical pictures, with the rarest possible exceptions—that is, it has happened not more than probably three or four per cent of the time; outside of

that the Chinese and the Loyola have played the same pictures.

Does that change your answer at all?

A. Hasn't the slightest bearing.

Mr. Mitchell: That is not true at the present time at all. The evidence shows it is not true.

The Court: '48, '49 and '50.

The Witness: It hasn't the slightest bearing on whether I would locate a theatre in an oat field.

The Court: It is 12:00 o'clock and that may not have any bearing on this case, but it is time, I think, to take [2553] another recess.

We are about to take another recess, ladies and gentlemen, and again it is my duty to admonish you not to discuss this case with anyone. You are not to permit anyone to discuss it with you, and you are not to formulate or express any opinion as to the rights of the parties until this case has been finally submitted to you.

With that admonition we will now recess until 2:00 o'clock.

(Whereupon, at 12:00 o'clock noon, a recess was taken until 2:00 o'clock p.m. of the same day.) [2554]

August 8, 1956, 2:00 o'clock, p.m.

The Court: Is it stipulated the jury is present in the box?

Mr. Corinblit: So stipulated, your Honor.

The Court: You may proceed.

Mr. Corinblit: Thank you, sir.

CECIL L. DUNN

the witness on the stand at the time of the adjournment, having been heretofore duly sworn, was examined and testified further as follows:

Cross Examination—(Continued)

Q. (By Mr. Corinblit): Mr. Dunn, one of the jobs you did for, I think Loeb & Loeb, defense counsel, was in connection with the Markoy case. I think you said that you did some studies to show the area of draw of the downtown and Hollywood theatres. A. That's right.

Q. That involved trying to find out where the people who went to the downtown and Hollywood theatres came from. A. Right.

Q. Do you know how many people came from the Westchester area under your survey?

A. No, I don't. [2555]

Q. You have no recollection? A. No.

Q. You understand that point has been raised in this case? A. I was not aware of that.

Q. You didn't know that? A. No.

Q. Have you got that survey in your office?

A. No, I haven't.

Q. You don't have those figures?

A. No, I don't, unfortunately. Now, wait a minute. I may be answering that incorrectly. I may have, but I think Loeb & Loeb have them.

Q. Loeb and Loeb have them, you think?

A. Yes.

Q. All right. If I asked you how many people

(Testimony of Cecil L. Dunn.)

came from Inglewood, you would give the same answer, you don't remember?

A. I couldn't answer any detailed questions about it.

Q. Do you remember it well enough to say that the number that came from Westchester was probably infinitesimal? Do you remember that?

A. No, I don't remember. I have no idea at all.

Q. No idea.

A. I can remember what the general pattern of distribution [2556] looked like for both the downtown and Hollywood theatres, but it was a long time ago.

Q. Incidentally, on that point, you remember that pattern of distribution showed an overlapping, didn't it, between downtown and Hollywood?

A. Yes.

Q. If you were to draw the same kind of arcs between downtown and Hollywood, this so-called football field would probably be three-quarters of a circle, isn't that right? Do you know what I mean or am I confusing you?

A. Yes, I know what you mean, but I don't think it would be quite as large as that, but here, sir, I am going simply on a very vague recollection of what those maps looked like. I wouldn't like to make a specific statement.

Q. You don't have any doubt in your mind that downtown and Hollywood were in substantial competition?

A. Not at all.

(Testimony of Cecil L. Dunn.)

Q. They were in substantial competition?

A. Yes.

Q. You know that for a long period the Hollywood and downtown theatres played day and date with each other first run. A. Yes.

Q. I take it your study showed that there was some draw from the Culver City area and downtown and Hollywood. [2557] A. That's right.

Q. And you know that there have been, as far as Universal pictures are concerned, for example, that they played day and date Culver City, downtown and Hollywood and other areas?

A. Yes.

Q. You know the figures show that there was some draw from the Studio City area in the Valley into Hollywood, you know, and downtown?

A. I think so, yes.

Q. You know as far as Universal pictures are concerned, they played day and date in the Studio City area. A. That's right.

Q. With downtown Hollywood?

A. That's right.

Q. Certainly you remember that the overlapping was considerable as to Wilshire Boulevard, as well as downtown and Hollywood, when they played first run in the Wilshire Boulevard area?

A. Well, I wouldn't wish to make a generalization, because the patterns shown by the individual theatres varied somewhat. I think the general conclusion is reasonable, yes.

(Testimony of Cecil L. Dunn.)

Q. You don't have any doubt that Wilshire Boulevard and downtown and Hollywood were in substantial competition with each other first run.

A. No.

Q. You know that they did play day and date?

A. On certain product, yes.

Mr. Corinblit: Now, then, I would like to have in evidence, so we can have some comparable figures, the Academy Theatre profit and loss statements. I offer the Academy Theatre profit and loss statements for 1948, 1949 and 1950.

The Court: They may be received in evidence.

The Clerk: Exhibit 81.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit No. 81.) [2559]

Mr. Corinblit: One more profit and loss statement, your Honor, and I will be ready to proceed.

I want to offer in evidence at this time as Plaintiff's exhibits next in order the profit and loss statement of the Ritz Theatre from 1948 on—from 1948 to 1951.

I want to offer as plaintiff's next in order a profit and loss statement of the Wilshire Theatre from 1948 to 1951, and a profit and loss statement of the Uptown Theatre from 1948 to 1951.

The Court: They may be received in evidence as Plaintiff's Exhibts 82, 83 and 84.

(The documents referred to were marked

(Testimony of Cecil L. Dunn.)

Plaintiff's Exhibits 82, 83 and 84, and received in evidence.)

Mr. Corinblit: I am removing the parts other than the years I have enumerated.

Q. Now, Mr. Dunn, I think you testified yesterday about a circle theory of drawing area depending upon what runs were involved—that is something that goes like this.

You have got a circle maybe that big on first run. This is not in proportion, you understand, and a circle for 7 days and maybe a smaller one for 14 days.

Now, applying that—withdraw that. Is that what you understand? Is that your opinion as to the fact that a first run theatre draws from a wider area than a 7 day theatre draws from and a smaller area that a theatre draws from on [2560] 14 day?

A. Yes.

Q. That is your opinion? A. Yes.

The Court: You will have to speak up.

The Witness: Oh, excuse me, oh, surely, it is.

Q. (By Mr. Corinblit): Is that your opinion in the Inglewood-Westchester area that the Loyola Theatre when it played first run drew from a wider area than the Academy drew—that the Academy Theatre drew from a smaller area on 7 days and the Fox-Inglewood Theatre drew from a smaller area on a 14 day?

A. I think that would follow.

Q. That is your opinion? A. Right.

(Testimony of Cecil L. Dunn.)

Q. Do you remember you prepared some maps in the Baldwin case, one of the maps you have got here, the Academy map, is that right?

A. That is right.

Q. And you gave some opinions in that Baldwin Theatre case about the Loyola and the Fox and the Academy. Do you remember that?

A. That is right.

Q. Do you remember what opinions you gave then?

A. No, I don't. [2561]

Q. In 1951?

A. No, I don't.

Q. Now, let us first talk about the Academy Theatre.

You recall you testified in that case that the area of draw would be on 7 day run approximately four miles?

A. That is right.

Q. Is that right?

A. Yes, sir.

Q. That is on the 7 day run.

Mr. Westbrook: May I have the page reference, counsel?

Mr. Corinblit: 3023.

Mr. Westbrook: Is that the printed page or typewritten page?

Mr. Corinblit: Printed page.

Mr. Westbrook: May I have the typewritten page number? It is indicated in the index.

Mr. Corinblit: Yes. I think approximately 3268.

Q. Now, I want you to read, Mr. Dunn, your testimony beginning on page 3022 with respect to the Fox Theatre in Inglewood, and running over to

(Testimony of Cecil L. Dunn.)

3023 at the end of your answer which I mentioned before. Those are the last three words which I mentioned.

(Handing pamphlet to the witness.)

The Witness: Yes, sir.

Mr. Corinblit: All right. [2562]

Q. Now, were you asked those questions and did you give those answers? A. Yes, I did.

Q. And were those answers true and correct when you gave them? A. Surely.

Q. All right. Now, I want to call your attention then to the last answer. Well, perhaps I will have to read the entire thing. [2563]

“Q. Will you state the results of your study and your opinion with regard to the patronage of the Fox Theatre in Inglewood?

“A. This represents 1600 individual patrons whose addresses were obtained on Thursday, the 7th, and Saturday, the 9th of June. The distribution is some what wider again. There is no quarter square mile in which there are more than four per cent.

“The symbolism of the yellow and the green blocks is again as heretofore.

“The shaded area, which is quite concentrated around the central axis, contains 45.8 per cent of the total patronage, and again the grouping along the principal lines of travel is noticeable. In this case the extension in the southerly direction is along Hawthorne Avenue. I think particularly to be noted

(Testimony of Cecil L. Dunn.)

is this scattering of patrons in the Westchester area and so on.

“There is also a good scattering of patronage to the east of the theatre, made possible by the travel along Slauson Avenue, and to a less extent along Florence, and to even a less extent along Manchester Boulevard.

“Again, in the next quadrangle, is the line of traffic, and in this area there is a very small [2564] percentage, amounting to 2.3 per cent of the total.

“The Court: What radius would you get there for the patronage?

“The Witness: And again, the bulk of the patronage in this instance would be, certainly 85 per cent of it, contained within the four miles which I mentioned before.” [2565]

Q. (By Mr. Corinblit): So 85 per cent on the 14 day availability of the Fox Theatre was within a radius of four miles, is that right?

A. That's right.

Q. That was the same radius of four miles for the 7 day theatre and the Academy Theatre, different areas, but still four miles?

A. You will note the reference in the transcript from which you have read to the southerly extension on Hawthorne Avenue. That was particularly the case in the case of the Fox Theatre. There was that long prolongation, that extension of the patronage of that theatre, and in that instance it gave us a somewhat wider, called for somewhat greater radius in this.

(Testimony of Cecil L. Dunn.)

Q. So that in this case the radius was how far?
Four miles? A. That's right.

Q. For the 14 day availability? A. Yes.

Q. Now, as a matter of fact, you were asked in that case about the area of draw of the first run Loyola, weren't you? Do you remember that?

A. I think so, yes.

Q. Do you remember that you testified that the radius of the Loyola, the first run theatre, was also four miles? Do [2566] you remember that?

A. If you say so, I did.

Q. I don't want you to take my word on it, Mr. Dunn. A. Well, let me do that.

Q. You can do that, but just so you are absolutely sure, just read page——

Mr. Westbrook: Counsel, would you give me the page reference?

Mr. Corinblit: Yes.

Q. Read 3270 of the typewritten transcript and page 3024 to 3025 of the printed transcript.

A. Yes, that's right.

Q. So the radius of draw of the Academy Theatre, 80 to 85 per cent, was also four miles?

A. Now, counsel, you have recently referred to the Fox Inglewood and now to the Loyola.

Q. Yes.

A. And your last sentence was a reference to the Academy.

Q. No, no, no. I'm sorry. I meant the Loyola.

A. Right, sure.

Q. Four miles radius, the draw. A. Yes.

(Testimony of Cecil L. Dunn.)

Q. Do you want to change your testimony, then, that you gave yesterday that the radius of draw is larger for first [2567] run than it is for second run and 7 day and 14 day?

A. No, sir. You have already this afternoon or this morning called my attention to the fact that the Loyola playing first run was playing first run simultaneously with the Chinese and with other theatres in the Los Angeles area, so I think the four mile answer for what we might call a multiple, or what I think you have called multiple first run policy is probably reasonable.

Q. I see. On a multiple first run policy, the draw on the first run would be four miles?

A. I don't think I am in a position to make that generalization. My answer runs only to what was actually the case at the Loyola at that time.

Q. All right.

A. But I think the inference isn't too bad.

Q. In other words, the inference is correct with respect to the Loyola at that time? A. Right.

Q. Four miles. A. Yes.

Q. And the inference is correct, four miles for the Inglewood on 14 day availability?

A. It was a fact.

Q. I mean it was a fact. A. Yes. [2568]

Q. It was a fact that it was four miles on the Academy Theatre availability? A. That's right.

The Court: So it doesn't make any difference whether it is first run, second run, or third run?

The Witness: No, no, no.

(Testimony of Cecil L. Dunn.)

The Court: It is all four miles.

The Witness: That isn't the case at all. The situation which counsel has just described is a particular situation which existed as of that time. The Loyola playing first run on this multiple first run arrangement at that time seemed to be drawing in a four-mile radius. Obviously, playing multiple first run, with a theatre located in the Wilshire district and the Uptown, the Uptown Theatre on Western, and what is it—Olympic, or Eighth, around there some place, the radius of draw was considerably restricted.

A further factor, which I think we must always take into account, was the character of pictures that were being played. Perhaps the so-called first run attractions at the Loyola at that time didn't have the drawing power that the competing theatre had. I wouldn't say. I certainly would not say that it makes no difference.

I simply say that, as I said at that time, the Loyola playing a multiple first run policy seemed to have the bulk of its patronage concentrated in about a four-mile area. [2569] What the Loyola might have done had it been playing exclusive first run is something on which I am not prepared to speculate.

Q. (By Mr. Corinblit): So that in the Baldwin case you testified that the first run is four miles, the 7 day is four miles, the Academy, and the 14 day availability, the Fox Inglewood, was four miles?

A. No, I didn't testify to that at all, counsel. I

(Testimony of Cecil L. Dunn.)

testified in the particular instance of the Loyola playing, as you have described it, on multiple policy, that that seemed to be the case. There were a number of reasons.

You will remember that my opinion with respect to the Loyola was not based upon a market survey of the character which is represented by this map here, which represents the draw of the Academy. That was simply an inference which I drew at the time based upon a variety of factors, including the geography of the region, and so forth. The other statements which I made with respect to the four-mile draw, however, were specific determinations.

Q. And that is with reference to the Academy and the Inglewood?

A. Right. The generalization which you are making here is not one which I can support.

Q. Let's turn to this Academy and Inglewood.

A. All right.

Q. You did make at that time on the basis of maps the [2570] determination that the draw of the 7 day was four miles and the draw of the 14 day was four miles.

A. That seemed to be true at that moment, yes.

Q. Now, in this case, Mr. Dunn, you testified that the draw of the 14 day is two miles.

A. What I have said is that the draw, the circle of the draw tends to diminish as the availability declines. As you get the subsequent runs, it gets smaller and smaller. Now, if it were true, and it was true, that the patronage of the Fox Inglewood

(Testimony of Cecil L. Dunn.)

at that time, 85 per cent of the Fox Inglewood at that time was contained in a four mile circle, it simply is an accident of that particular determination. The size of that circle was specifically increased by the unusual prolongation of the distribution of the Fox Inglewood patronage in a southerly direction along Hawthorne Boulevard, which tended to make that circle a little larger than would otherwise have been the case.

I am quite convinced that in general my view that the circle gets smaller as the runs get later is a good one.

Q. I can see that you are convinced and you want to stick to your conclusions. I am addressing myself to the facts upon which you base the statement. As I understand it, in this case it is your positive testimony that on 14 days the draw is approximately two miles in the Inglewood-Westchester area. [2571]

A. I have said two to two and a half miles.

Q. Two to two and a half. A. Yes.

Q. But in the Baldwin case you said, and as of the same time, 1951, when that survey was made, that the draw of a 14 day theatre was four miles.

A. A 14 day theatre in a precise instance, yes.

Q. I am talking about precise instances. I am talking about the Inglewood-Westchester area, no other area, Mr. Dunn. You understand that?

A. That's right.

Q. Now, you said in a precise instance, a 14 day

(Testimony of Cecil L. Dunn.)

availability in the Inglewood-Westchester area, the draw was 4 miles.

Now, in this trial you say in a precise instance the draw of a 14 day availability is two and a half miles to two miles.

I want to know which is the correct answer.

A. Both answers are correct.

Q. It is both two to two and a half and four miles?

A. No, no. Just let me tell you why both answers are correct. The specific answer to which you are referring related to the Fox Inglewood. It had that unusual radius, shall I say, on account of this displacement, this prolongation of its patronage in a southerly direction along Hawthorne Boulevard. [2572] In that case, yes, 85 per cent of the patronage was included in a four mile circle.

But in general, and not resting the conclusion solely upon the particular case of the Fox Inglewood, in general the draw of a 14 day theatre is less than the draw of a 7 day theatre, and, further, the draw of a 21 day theatre is still less than that. That is the general proposition and that is true in my judgment. [2573]

Q. You drew a map for the Fox-Inglewood just like this map you drew here—for the Academy?

A. Yes, I did.

Q. Right? A. Yes.

Q. The same map with little dots on them?

A. That is right.

Q. Same kind of a thing? A. Same thing.

(Testimony of Cecil L. Dunn.)

Q. In that case? A. Yes.

Q. But you say that map was a distortion of the true picture?

A. No, sir, no, sir. It was not a distortion of the true picture.

Q. It was not a distortion?

A. No, it was a true picture of what we learned about the Fox-Inglewood and in the case of the Fox-Inglewood instead of having a fairly closely concentrated area like we have in many instances, there was a considerable prolongation of the patronage down along Hawthorne Boulevard.

Now, therefore,—look, may I draw you a picture, please?

Q. Yes.

A. If we have a concentration of theatre patronage like this, which is more or less uniform around the center, [2574] you can contain it within a figure which is, generally speaking, a circle. But if for some reason like the existence of Hawthorne Boulevard, like the existence of a streetcar system which in those days existed on Hawthorne Boulevard, and may have had some effect in drawing the patronage from the Hawthorne area in the Inglewood area, you get what looks like an egg shape or somewhat more nearly egg shape distribution in order to contain all of that within the circle.

You remember the circle is just a convenient figure for describing this thing. You have to draw a bigger circle.

Now, what was true in the Fox-Inglewood situa-

(Testimony of Cecil L. Dunn.)

tion isn't necessarily true of theatres in general if they exist.

Remember, please, these other factors which I have tried to stress, the availability of transportation, the lines of movement of traffic, the distribution of population and so on.

All of those things will influence it and the size of the circle you draw will be governed to some extent by that and in this instance that was true.

Q. Now, this two or two and a half mile draw on 14 days—there is a two or two and a half mile draw on 14 day availability, is that true?

A. That is right.

Q. Now, do you know, Mr. Dunn, in that case it has been established by the play-off of the Paradise Theatre—I will withdraw that question. [2575]

If you draw a circle—when you say that the draw of a theatre is two miles, you mean on the 14 day? You mean that a customer outside the two miles—that is a resident outside the two-mile area is probably not a customer of—a prospective customer of the theatre when it is playing on 14 day availability? A. He is a less probable customer.

Q. Less probable customer? A. Yes.

Q. Now, that same customer located just outside the two-mile area but within the four-mile area is probably a customer where the theatre is playing on a 7 day availability?

A. Somewhat more probable customer.

Q. More probable? A. Right.

Q. Now, I want you to note in the Paradise, the

(Testimony of Cecil L. Dunn.)

situation of the Paradise in almost every instance that you went into with Mr. Westbrook, when the Paradise played a picture, the top half of a bill on the 7 day availability, the second half of the bill was on a 14 day availability or a 21 day availability.

Now, I want you to tell me what happens to that customer who lives outside the two-mile area, who was a possible customer for the 7 day availability, but not such a likely possible customer for the 14 day picture when they are both [2576] playing on the same bill.

A. I don't think I understand your question. I am sorry, sir.

Q. You testified that if a customer lives within two miles, if he is within four miles, he is a likely customer for the Paradise Theatre. For example, if it played a picture on the 7 day availability, right?

A. That is right.

Q. However, if the Paradise played a picture on the 14 day availability and the customer lived more than two miles but less than four miles, he wouldn't be so likely a customer?

A. That is right.

Q. That is right? A. Yes.

Q. I want to know what happens to that customer when the Paradise plays a picture on the 7 day availability at the top half of a bill and on the 14 day or 21 day on the second half or the bottom half of the bill.

A. I can't tell you.

Q. That is you have the problem of a customer who is torn both ways?

A. That is right.

(Testimony of Cecil L. Dunn.)

Q. He might drive for the 7 day picture, but he wouldn't drive for the 14 day picture, so he is not a possible customer on the 14 day picture?

A. Well, I would say less probable. But are you addressing yourself now wholly to the question of bottom halves of the bill?

Q. I beg your pardon?

A. Are you talking exclusively about the bottom half of a bill?

Q. Yes, for now. I will get to the other later on.

A. I can't answer your question. I am sorry.

Q. From a business point of view, you don't have any doubt that that would be a serious prejudice to a theatre in that kind of situation where a man living between that two and four-mile area—he is too far to go to the 14 day but far enough to go to the 7 day. That would be a serious prejudice in the operation of a theatre.

A. That question seems to me so dependent upon the first run, which I am afraid I don't wholly understand, I wouldn't want to answer that either.

Q. All right. Now, Mr. Dunn, turning to this two-mile or two and a half-mile circle. You testified that the radius of draw on the 14 day availability is two to two and half miles. Now, if you were wrong about the 7 day draw—in other words, if the 7 day draw was really from a two-mile area or a two and a half mile area, your analysis of competition would be changed substantially, would it not, if you were wrong? [2578]

Mr. Mitchell: I object to that as being argu-

(Testimony of Cecil L. Dunn.)

mentative and a hypothetical question, your Honor.

The Court: I think you are arguing with the witness. You can argue to the jury about that question when the time comes.

Mr. Corinblit: I am asking the witness to speculate on a point just as Mr. Westbrook this morning asked him to speculate as to what would happen if the Academy Theatre lost 25 per cent of its profits.

Perhaps I can phrase the question a little differently.

Q. Let us turn to these circles. These circles are four-mile circles, is that right?

A. That is right.

Q. There is one around the Academy and there is one around the Paradise.

Mr. Westbrook: And one around the Southside.

Mr. Corinblit: Yes.

The Witness: Southside and Paradise.

Q. (By Mr. Corinblit): If the radius of your circle were two miles instead of four miles, there would be no football area, would there, overlapping because under your testimony they are 6.8 miles apart?

Mr. Mitchell: That is argumentative, your Honor.

The Court: The objection is overruled. This is preliminary. [2579]

The Witness: Sure, that is right. It is a matter of geometry here.

Q. (By Mr. Corinblit): So, there wouldn't be any overlap if the radius of draw was two miles in-

(Testimony of Cecil L. Dunn.)

stead of four miles between the Southside and the Paradise? A. That is right.

Q. And the same thing would be true between the Academy and the Paradise, wouldn't it, if the radius of draw—they are about four and a half miles apart as stipulated to here, so if the radius of draw were two miles on the 7 day availability instead of four miles, then again those circles wouldn't overlap, would they?

A. No. You can draw any number of circles that wouldn't overlap.

Q. In that situation they would not overlap?

A. No, they wouldn't.

Q. All right. Now, you have testified that on the 14 day availability that is exactly what would happen if the Southside were playing on the 14 day and the Paradise were playing on the 14 day since their area of draw is only two miles. They wouldn't overlap, is that right?

A. The circles wouldn't overlap.

Q. All right. Now, if you were wrong about the 7 day draw and if that 7 day draw was two miles, just like you say the 14 day draw is, then they wouldn't overlap on the 7 [2580] day, would they?

Mr. Mitchell: I object to that as argumentative and a hypothetical question. It is the same question again.

The Court: Objection sustained. We have no evidence here about a two-mile draw on a first run theatre.

(Testimony of Cecil L. Dunn.)

Mr. Corinblit: It is 7 day availability, your Honor. I am talking about 7 days.

Mr. Mitchell: There is no evidence of two-mile draw on 7 day availability. The only evidence is a four-mile draw and that isn't exactly the evidence. The four-mile circle contains, according to the witness' testimony, about 85 per cent of the patronage and outside the four-mile circle as shown by the many red dots the draw of the Academy extends a way beyond the four-mile circle.

The Court: Yes. My understanding of the testimony is that he said 85 per cent of the patronage.

The Witness: Yes, sir.

The Court: Would come within the four-mile area.

Mr. Corinblit: But I am pointing out, your Honor, if Mr. Dunn was wrong and if his circles on the 7 day here as between the Southside and the Paradise or between the Academy and the Paradise were drawn with a radius of two miles instead of four miles on the 7 day availability, they wouldn't overlap.

The Court: The circles wouldn't overlap? [2581]

The Witness: No.

Q. (By Mr. Corinblit): Now, these circles—you are not just drawing circles on the map, are you? You are drawing circles to show something about competition?

A. I am indicating competition. Those circles are based upon the actual distribution.

Q. They are based upon the distribution on this

(Testimony of Cecil L. Dunn.)

map. I don't know what the number of the exhibit is, but this one right here. A. That is right.

Q. Where did you get the figures for that map, Mr. Dunn?

A. You mean those figures on that map?

Q. Yes.

A. Those are the ones I developed myself.

Q. You developed them yourself?

A. Why, surely. That represents our findings in the Academy survey.

Q. All right. Now, when did you take that survey?

A. In May, May 31st and June 2nd, 1951.

Q. On a Thursday and one on—

A. Saturday.

Q. One on Saturday? A. Yes.

Q. How many people did you talk to? [2582]

A. 1683.

Q. In two days? A. Two days.

Q. Do you know how many customers the Academy Theatre had in the year 1950 or '51?

A. No, sir.

Q. Have you any idea? A. No.

Q. For the year 1951, Mr. Dunn, the record in evidence shows that 351,000 tickets were sold at the Academy Theatre. A. Yes.

Q. That is over a period of 365 days. Now, you took a sample on a Thursday and a Saturday when Bob Hope's picture—what was the title of it?

A. The Lemondrop Kid.

Q. The Lemondrop Kid was playing and you

(Testimony of Cecil L. Dunn.)

took that sample and you applied it to the entire 351,000 customers, didn't you? A. Sure did.

Q. You took those two days with the Bob Hope picture *The Lemondrop Kid* and you applied it as a general proposition for the whole period, isn't that correct? A. That is right.

Q. You didn't take any other days of the week or any other period of the season to verify your figures, did you? [2583] A. Didn't have to.

Q. You didn't do it?

A. No, it wasn't necessary.

Mr. Corinblit: I move to strike that portion of the answer out.

The Court: It may go out.

Q. (By Mr. Corinblit): You did not do it?

A. No. The answer is "No, I didn't do it."

Q. Now, you don't know whether or not if you took—you don't know from any experiment whether if you took that same—if you took a sample the following week or the week before or six months before, you don't know from a sample that the result would be the same, do you, from a sample?

A. Not from this sample.

Q. From any sample that you took?

A. Yes. I do not have any sample of this particular problem, but from the general practice of sampling in market research technique, a half of one per cent, which is what we have here would be 1651 out of 351,000 is generally more than ample.

Q. One half of one per cent, you say, is more than ample? A. Surely.

(Testimony of Cecil L. Dunn.)

Q. According to good statistical practice?

A. Yes, sir. It depends upon the stability of the result you get and I described the process by which we had tested the stability of the pattern as the pattern developed.

Q. We will get to that testing process in a minute, Mr. Dunn. A. Yes.

Q. I just want to make it absolutely clear to the jury that in your conclusion you base a statement of the four-mile draw of the Academy Theatre on a sample taken on a Thursday and a Saturday on a single picture, and on no other basis as far as samples are concerned.

A. No other basis as far as the data are concerned.

Q. As far as the samples are concerned, the data. The data is the same thing. A. No.

Mr. Mitchell: It is not the same thing.

The Witness: It isn't the same thing.

Q. (By Mr. Corinblit): Well, no other samples, no other actual factual experiments at the Academy Theatre. A. That's right.

Q. That's all of it right there, in that two day sample, [2585] is that right? A. That's right.

Q. In that sample, Mr. Dunn, do you remember how many people you missed?

A. No, I don't remember how many we missed, but I testified, I believe, that we got the bulk of the patronage.

Q. By the bulk, you mean the majority?

A. Yes.

(Testimony of Cecil L. Dunn.)

Q. Now, it is a fact, isn't it, Mr. Dunn, that this kind of a sample violates every principle of good statistical practice?

A. No. As a matter of fact, this type of sample represents the basic principles of good statistical practice.

Q. You mean it is good statistical practice not to check a result that you obtain from the same picture on two days out of the year and to apply that principle on the basis of a result of one half of one per cent?

A. Surely. How many people out of the United States do you suppose Mr. Gallup interviews?

Q. Now, Mr. Dunn, suppose, and this is kind of an unusual situation, but suppose — did you ever hear of a fan club? Are there fan clubs in the motion picture business? A. Yes, there are.

Q. Suppose there were a lot of people who liked Bob Hope, but they don't particularly like too many other kinds of [2586] pictures, and Bob Hope in this Inglewood-Westchester area was playing only in two theatres. The only place they could see Bob Hope at that time was at the Academy and the Southside Theatres. If you had those kind of people and they went to the Academy that night, that would distort the result, wouldn't it?

Mr. Mitchell: I object to that upon the ground there is no foundation for it. That is an argumentative question.

The Court: Sustained. It is purely an argument.

Mr. Mitchell: Speculation in the extreme.

(Testimony of Cecil L. Dunn.)

Mr. Corinblit: Well, your Honor, this witness has speculated from the moment he got on the stand, and I think I can join with him in the course of speculation.

The Court: Suppose you ask him another question then.

Mr. Corinblit: All right. May I have Defendants' Exhibit Y-3-A and Y-3-B?

(Clerk handing exhibits to counsel.)

Q. (By Mr. Corinblit): I will place before you Defendants' Exhibit Y-3-A and Defendants' Exhibit Y-3-B, Mr. Dunn.

First turning to Y-3-A, this exhibit Y-3 is the result of the computation that you have on Y-3-A, except for this last figure down here, is that right? The last figure is——

A. What is the last figure? [2587]

Mr. Westbrook: The last figure is based on Y-3-B, in accordance with the testimony.

Mr. Corinblit: Y-3-B.

Mr. Westbrook: That's right.

Q. (By Mr. Corinblit): So this Exhibit Y, everything except the last figure is based on Y-3-A?

A. That's right.

Q. And the last one is based on Y-3-B?

A. Right.

Q. These figures here, this percentage, the actual figures are no better or worse than the accuracy of the figures in Y-3-A, is that right?

A. That's right.

Q. Now, if you will turn to Y-3-A; on the first

(Testimony of Cecil L. Dunn.)

page you made a comparison. Well, let me withdraw that for a moment.

Y-3-A really amounts to this, doesn't it? You have taken the pictures that played day and date between the Paradise and other theatres?

A. That's right.

Q. You have taken the first week's gross?

A. That's right.

Q. You have compared the grosses?

A. Right.

Q. If there is something artificial in one of the [2588] grosses or the other, something unusual or artificial, that would distort the picture, wouldn't it?

Mr. Mitchell: Object to it as being argumentative, no foundation for that at this point, simply a hypothetical question.

Mr. Corinblit: Let me withdraw the question.

The Court: Well, it is, but this is cross examination, and if he hadn't used the right figures, it certainly would change the computation. Objection overruled.

The Witness: I didn't understand Mr. Corinblit to imply that we hadn't used the right figures. I thought that by something artificial he was referring again to the presence of the Bob Hope fan club or something of that character.

Q. (By Mr. Corinblit): Well, there are some other things that might be artificial, Mr. Dunn.

The Court: I will sustain the objection now until you define what you mean by artificial.

(Testimony of Cecil L. Dunn.)

Mr. Corinblit: Yes, sir.

Q. If one of the theatres — when you make a comparison between two theatres playing day and date, if one theatre during that week had a prevue and the other theatre didn't, would that distort your comparison, or do you know?

A. I don't know. I tend to stay away from them. Some people probably tend to go to them. I am open minded on the matter. [2589]

Q. You don't understand my question, Mr. Dunn. You know if a theatre advertises a prevue, when it is playing 7 day, that could mean \$800 to \$1,000 gross increase, do you know that?

A. No, I don't know that.

Mr. Westbrook: That is contrary to the fact. There is no evidence of that.

The Court: There is no evidence like that in the record, as far as I know.

Mr. Westbrook: You had prevues at the Paradise, too.

The Court: Not as to what a prevue would bring in.

Mr. Corinblit: I beg your pardon?

The Court: Not as to what a prevue would bring in, there is no evidence.

Mr. Corinblit: All right, your Honor. I am sure the defendants' witnesses themselves won't quarrel with the proposition, but we will get to that.

Q. You know about the impact of a bank night upon the gross receipts? A. No, I don't.

Q. You don't? A. That I really avoid.

(Testimony of Cecil L. Dunn.)

Q. Do you know what the impact upon the gross receipts is if the theatre is playing at the bottom half of the bill [2590] the same picture that it played the week before at the top half of the bill?

A. I would think that would probably tend to diminish the total draw somewhat.

Q. Somewhat? A. Yes.

Q. This business of somewhat, now, if the week before 3,000 people had come to see the picture and the next week those 3,000 people are eliminated from the possibility of going to that theatre, unless they want to see the picture again—is that right?

A. They might be willing to do that in order to see the top feature that was playing the second week.

Q. You don't do that, do you?

The Court: He doesn't even go to the picture shows.

Mr. Corinblit: That's right. So we have got no problem there.

Q. Moreover, if the second feature at one theatre is an A picture, double A picture, and the second feature of the second theatre is a C or a D picture, that is going to affect the gross, isn't it?

A. A, double A, C and D, refer to what?

Q. Well, suppose the Paradise Theatre is playing an A picture at the top half of the bill and a D picture at the bottom, and the Southside is playing two A pictures, one at [2591] the top and one at the bottom?

(Testimony of Cecil L. Dunn.)

The Court: May I ask this witness a question? I don't think he understands.

The Witness: Well, I asked him.

The Court: Do you understand?

The Witness: I asked him what was this A, double A, and so forth. [2592]

Q. (By Mr. Corinblit): Do you know what that means in the business?

A. I have a rough idea but I wonder what you mean.

Q. I would like to know if you have a rough idea? Can you tell us that?

A. I think it is a gradation. I am not sure. It is a gradation of quality or some standard, isn't it?

Q. I think that is about right.

A. Is that the standard you use?

The Court: Do you know the way to tell a grade A picture from a grade B picture?

The Witness: How I would tell?

The Court: Yes, in your own mind.

The Witness: The standard I applied here was the national gross rentals and the Los Angeles exchange territory rentals.

The Court: But you were comparing pictures with the same rentals?

The Witness: Oh, but in selecting the groups of pictures which I compared, when I was striving for a measure of comparability, I went to what is at least for an economist, the objectives—how much money did it make.

(Testimony of Cecil L. Dunn.)

The Court: What is the difference in money between a grade A picture and a grade B picture?

The Witness: I don't know. [2593]

The Court: Or a grade C picture?

The Witness: That is why I was asking Mr. Corinblit if there was some standard in the trade as to whether there was a regular scale or is this just a convenient expression such as 'this four-mile circle.

The Court: I am satisfied this witness doesn't know what you are talking about.

Mr. Corinblit: Yes.

Q. Mr. Dunn, you did prepare Exhibit Y-3-A, didn't you? A. I surely did, yes, indeed.

Q. You went through the Paradise list and you took every picture, didn't you? A. Right.

Q. And wherever they played day and date?

A. That is right.

Q. And you took the other theatre's pictures, too? A. That is right.

Q. But you didn't add to this what was playing on the second bill, did you?

A. I have some information on that, yes.

Q. Well, not on Exhibit Y-3-A, the exhibit in evidence. Did you add them? A. No.

Q. You did not. And as a matter of fact, this whole group of pictures, this whole group of figures hasn't any [2594] reference whatsoever to the comparability of the second features?

A. Yes, yes — no, no. It isn't represented by those figures, but I am satisfied by a comparison

(Testimony of Cecil L. Dunn.)

generally of the rentals which were paid for the second features that the programs were in the main at a standoff.

Mr. Corinblit: Your Honor, I move to strike the portion of the answer beginning with the words "I am satisfied" as being non-responsive to the question.

Mr. Mitchell: He is explaining his answer.

The Court: Motion denied.

Q. (By Mr. Corinblit): Could I hear the last few words of the witness' answer?

(Answer read.)

The Witness: I am satisfied from a comparison of the rentals which were paid for the second features that the programs were in the main at a standoff. In other words, in the absence of any other information as to what might be a measure of the quality of the second feature, I looked at the rentals which were paid for them.

Q. (By Mr. Corinblit): Before we spell that out, Mr. Dunn, let us start with this proposition.

You don't have any doubt that a second feature on a 7 day availability is worth more at the box office than a second feature on a 21 day availability. That is pretty clear in your [2595] mind, is it not?

Mr. Mitchell: The same feature, or do you want him to evaluate a good picture on a 21 day availability with a bad picture on a 7 day availability?

The Court: This witness is an expert on economics and I don't think he has qualified himself as an expert in the motion picture field at all.

(Testimony of Cecil L. Dunn.)

He is testifying from an economist's point of view and not from the question of whether or not a 21 day picture on the second half of a double bill is better than a 21 day picture.

Mr. Corinblit: Well, your Honor, this witness under the examination of Mr. Westbrook purported to make certain comparisons.

The Court: That is right. And he testified as far as the evidence shows, that all he did was to use the top half of the bill. There is nothing there to indicate the second half of the bill was considered.

Mr. Corinblit: Is his Honor's testimony correct?

The Court: It is not testimony.

Mr. Mitchell: That is an improper question.

The Court: The jury is instructed to disregard that.

Mr. Mitchell: I don't think the witness should be put on that spot.

The Court: I am not testifying but I am telling you what my impression of the testimony of this witness is. [2596]

As a general rule, when you talk about revenue or gross receipts of a theatre the average person gives no consideration to the second half of the bill. It should be considered, but they just don't give any consideration to it.

Mr. Corinblit: Your Honor, I must say, is concluding something about the average person here. I think the testimony is——

The Court: I consider myself to be an average person.

(Testimony of Cecil L. Dunn.)

Mr. Corinblit: And I am myself but the point is I think your Honor stated once in a trial that gross receipts referred to the total bill.

The Court: And it does.

Mr. Corinblit: In other words, you have got to look at both bills in order to know whether or not you have a comparison.

The Court: That is right. And you brought out now in making this comparison that he did not consider the second feature except in his opinion that they were comparable.

Q. (By Mr. Corinblit): Now, when you use the word "comparable," Mr. Dunn—— A. Yes.

Q. ——what did you mean?

A. Oh, I thought that in general the programs which were under comparison were free from these distortions to which you have referred. [2597]

I didn't think that there was anything in the character of the two features which produced distortions of that character.

But let me stress the fact that what we are showing here is what actually happened. I mean whatever the other half of the bill was, this is what happened on the days when these programs were played.

Now, that is all I have purported to testify to here at all, was what actually happened and what that tells me or what opinion that—or what conclusion I reach with respect to competition.

Q. But the reason for your statement, the reason for your statement which is, of course, the most

(Testimony of Cecil L. Dunn.)

important thing for the jury to understand, the reason for your statement has really nothing to do with any knowledge that you have about the value of one second feature over another second feature, isn't that right?

A. The reason for my conclusion about this question of substantial competition arises from my comparison of these actual bills. Whatever they involved second featurewise came from my comparison of the bills.

Now, I think from what I know about the second features and my comparison again is based wholly upon or largely upon a comparison rested on their rental value; that there is no significant distortion in these programs, but the basic [2598] thing is what actually happened, and in this real situation the theatres are in competition.

Mr. Corinblit: Your Honor, I have just a few more matters. This might be a good time for the recess.

The Court: I might say for the benefit of the jury that the cross examination of a witness is not only to bring out additional facts, if you can bring them out, but it is also to discredit the statements previously made by the witness.

Now, if it can be shown that the witness testified differently in another case, then a question of doubt arises as to whether or not the first testimony was correct or the second testimony was correct. And all this rigmarole that we are going through now is for two purposes: One to bring out additional in-

(Testimony of Cecil L. Dunn.)

formation and also to raise a question in the minds of the jury as to the testimony of the witness and as to how much you can believe of this witness' testimony.

Now, I told you before that as to expert witnesses, you don't have to take their opinions at all. You can entirely disregard them or you can accept their opinions in toto, or you can accept part of them or reject part of them.

Now, this witness has been testifying about certain matters that we have been listening to now for nearly 20 days. It is just possible that some of you have come to the conclusion that you know more about the subject than the [2599] witness does, and you may disagree with the witness entirely about his testimony.

So, this is a question of fact for you to decide and you can rely upon this witness' testimony or you don't have to rely upon it. But you are to come to your own conclusions from all of the testimony in the case and not from the testimony of any particular witness.

It is time to take another recess and again it is my duty to admonish you that you are not to discuss this case with anyone and you are not to permit anyone to discuss it with you. You are not to formulate or express any opinion as to the rights of the parties until the case has been finally submitted to you.

With that admonition, we will now recess until 15 minutes after 3:00 o'clock.

(Testimony of Cecil L. Dunn.)

(Short recess.) [2600]

The Court: Stipulate the jury is present in the box?

Mr. Corinblit: So stipulated, your Honor.

The Court: You may proceed.

Q. (By Mr. Corinblit): Mr. Dunn, I think you testified under Mr. Westbrook's examination that—you haven't drawn circles, but Mr. Westbrook asked you whether in your opinion the Southside and the Academy Theatres were in substantial competition with each other. A. That's right.

Q. And there is no question in your mind that that is true, is that right?

A. That is quite right.

Q. As a matter of fact, there are about—I always forget the figure—is it four and a half, the Southside?

Mr. Westbrook: If you are talking about the shortest driving distance, it is four and a half miles.

Mr. Corinblit: Four and half?

The Witness: Yes, that's right.

Q. (By Mr. Corinblit): Four and a half miles apart, so if you drew your famous four mile radius, you would just about come right up to the theatre, so that they would probably overlap about 50 per cent, is that right? That is 50 per cent of the circles.

A. 50 per cent of the radius in the area. [2601]

Q. Yes. So you say that 50 per cent of the circle, four mile circle of the Academy Theatre would overlap about 50 percent of the four mile circle of

(Testimony of Cecil L. Dunn.)

the Southside. You understand that the evidence shows in this case that on, oh, a great many pictures, excluding Loew's, a great many pictures the Southside and Academy play day and date. You understand that to be a fact? A. Yes.

Q. They played simultaneously?

A. Right.

Q. Although it is your opinion that they are in substantial competition with each other.

A. Right.

Q. On the 7 day availability. A. Right.

Q. Incidentally, you understand that the Southside Theatre is a 1500 seat house, you understand that? A. Yes.

Q. As compared to the Paradise being less than that, a little over 1300. A. That's right.

Q. And the Southside, of course, is at——

A. It is Vermont and Imperial.

Q. Vermont and Imperial, that's right.

A. Yes. [2602]

Q. All right. Now, there is between the Southside and the Academy no geographic impediment, is there? A. No.

Q. In other words, it is a straight shot up Manchester—what would it be, to Vermont?

A. Between the Southside and the Academy?

Q. Yes.

A. You can go Vermont to Manchester, across Manchester would be the easiest way to do it.

Q. Across Manchester. A. Yes.

Q. No impediments at all. If you go between

(Testimony of Cecil L. Dunn.)

the Academy and the Paradise, you have got to do things like going by a cemetery between the Academy and the Paradise, if you go along Manchester?

A. You do pass a cemetery, yes.

Q. A cemetery. A. Yes.

Q. And you pass the race track over there, or is that further off?

A. It is actually a golf course that occupies that end of the tract, and there is the race track and the golf course and all.

Q. You have got to go over a railroad track?

A. Yes. As a matter of fact, you go over a railroad [2603] track going from the Southside to the Academy, also, if you go along Vermont Avenue.

Q. If you go along Vermont? A. Yes.

Q. All right. Now, on the 7 day run your chart showed—I don't think you set up that chart. You know that from time to time theatres in downtown Inglewood play day and date with the La Tijera Theatre, do you know that to be a fact?

A. Let me look.

Q. All right. You won't find it on that, if I understand the schedule you are looking at. It is the one that went into evidence. That is the Paradise and other theatres. If you will take the La Tijera, you will find from time to time the La Tijera played pictures day and date with the United Artists Theatre in downtown Inglewood.

A. Yes, that is true. I have some pencil notations here on what was playing in a variety of places. That's right.

(Testimony of Cecil L. Dunn.)

Q. You have no doubt that those theatres were in substantial competition with each other.

A. No.

Q. The La Tijera and the Southside sometimes played day and date, that's right too, isn't it?

A. Oh, yes.

Q. And those two theatres—— [2604]

A. Wait a minute. No.

Q. I think you put in a schedule on that.

A. That's right. Excuse me. That's right.

Q. Is that right? A. Yes, that is correct.

Q. They played day and date with each other?

A. They did, right.

Q. You don't have any doubt that those two theatres are in substantial competition?

A. No.

Q. So throughout this area, throughout this whole area, these companies involved in this case, except for Metro, which had the exclusive arrangement, all permitted theatres, other theatres, other than the Paradise, all permitted these other theatres to play day and date, even if they were in substantial competition with each other, isn't that right?

A. I assume so, yes.

Mr. Corinblit: I have no further questions.

The Court: Mr. Johnston?

Mr. Johnston: I have no questions, your Honor.

The Court: You are not participating in this, are you?

Mr. Johnston: I beg your pardon, sir?

The Court: You are not participating in this?

(Testimony of Cecil L. Dunn.)

Mr. Johnston: Just as a listener. [2605]

The Court: Just as a listener.

Redirect Examination

Q. (By Mr. Westbrook): This morning, Mr. Dunn, Mr. Corinblit on cross examination requested your attention to a number of propositions that he advanced with regard to the playing of multiple runs in the sense that runs played in what you call the regional centers around Los Angeles at various times after—I think the earliest time was 1952, and some distributors didn't do it until 1955, and so on, and some distributors now do exclusive runs on most of their pictures, and so on, but he directed your attention generally to that subject.

Now, having in mind that we were talking about 1950 and 1951 during your direct testimony, and that Mr. Corinblit jumped a period of time here in cross, I would like to ask you whether there were any economic factors present in the Los Angeles area which would bear upon the desirability of playing additional runs in the Los Angeles area during the later periods.

Mr. Corinblit: Object to that question, your Honor. Now that we have had the direct and cross, I think it is clear there is no foundation for this witness' knowledge as to the profits or the way distributors ought to sell or ought not to sell, because he has no knowledge of those subjects. [2606]

The Court: Overruled. I think I know what he is trying to bring out. Overruled.

(Testimony of Cecil L. Dunn.)

The Witness: Yes, I think that in the——

The Court: You can answer that yes or no.

The Witness: Yes, there have been changes.

Q. (By Mr. Westbrook): Will you state those changes?

Mr. Corinblit: Same objection, your Honor.

The Court: Same ruling.

The Witness: The thing which seems to me to be most significant in this circumstance is the considerable change in the overall nature of the Los Angeles market area. In 1951, for example, the total population of Los Angeles County was 4,288,000—222,000. As of now, unbelievably, it is 5,290,000, an increase of more than a million persons in the intervening five years—22½ per cent.

Now, what that means from the standpoint of the growth in importance of these regional centers that I talked about and what it means from the standpoint of the increased difficulty of getting around, the increased traffic congestion, and so forth, I think is self-evident.

There have been, I think, basic changes in the nature of the market area which would have an important influence on the way pictures were played.

Q. What about the general distribution of this new population in the Los Angeles metropolitan area? [2607]

A. Almost all on the outside, and very little of it—as a matter of fact, the downtown area, as we

(Testimony of Cecil L. Dunn.)

discussed it a day or two ago, is actually losing population.

Q. That is in the urban center of Los Angeles?

A. Yes.

Q. There are substantial areas that are losing population?

A. Right, and new population is settling around the outside.

Q. And presumably some of the old as well.

A. Oh, yes, right, a lot of it in fact.

Q. What about traffic considerations as between 1950 and the present time?

A. Of course, the aggravation of traffic conditions in Los Angeles County in the years since the war is something with which I think everyone is familiar. The congestion on all of our major boulevards, including the freeways, is rising at such a rate that the State Highway Commission—well, they just can't keep their program of highway development ahead of the growing problem of traffic.

Transit times, both by private automobile and especially by public transportation, have increased anywhere from 5 to as much as 50 per cent in the last five years. In other words, it takes from a few minutes to half again as long to get between two points in the Los Angeles metropolitan [2608] area as it did five years ago.

Q. Is there any difference between the motion picture market itself in 1950 and 1951 which you observed that does not exist, or if it does exist, exists to a less extent today?

(Testimony of Cecil L. Dunn.)

A. Yes. The motion picture industry at the present moment is in considerably better health than it was in 1951. In 1951 it was experiencing the first heavy impact of competition from television. It was trying to adapt itself to the new problems which arose therefrom. At the present moment it seems to have met the challenge pretty well. I think that the industry is now in a pretty healthy condition. Its practices seem to have steadied down. The general operation is apparently much more secure than it was five years ago.

Q. Along with these factors that you have mentioned, has there been any change in the tendency of other businesses toward decentralization?

Mr. Corinblit: I object to that as being immaterial. The witness testified the difference between the motion picture business and any other business.

The Court: Well, aren't you willing to agree, Mr. Corinblit, there has been a tendency to decentralize business in recent years?

Mr. Corinblit: Your Honor, that tendency began in 1945 and was in tremendous development in 1951.

To state that it is just coming to fruition in 1956 seems to me is contrary to the facts.

The Court: Objection overruled.

The Witness: Yes. I think that the tendency toward decentralization, and I think we can go, so far as Southern California is concerned, I think we can go, Mr. Corinblit, a few years more if you like, sir.

Los Angeles historically, I think, has been de-

(Testimony of Cecil L. Dunn.)

scribed as seven suburbs in search of a city. The pattern of decentralization which is common here for a long while has been, however, tremendously accelerated since the war.

If you think of something like the department store industry, to which we alluded a while ago, I can think of a half dozen major suburban branch department store locations that have been started within the last two years, and that is only one, I think, indication of this pattern of decentralization which is going forward with increased rapidity [2610] all the time.

Q. (By Mr. Westbrook): I wonder if I might at this time have the exhibits that Mr. Corinblit introduced this morning, 78 and 80.

Mr. Dunn, you will recall that Mr. Corinblit read theatre profits from these statements this morning.

I would like now to read into the record for the respective years which Mr. Corinblit referred to, the film rentals paid by the two theatres that he referred to, namely the Loyola and the Chinese.

In the year 1948, which I believe was one of the first he adverted to, the Chinese paid \$169,826 for its programs, as against \$141,179 for the Loyola; approximately a difference of \$28,000 more paid by the Chinese than the Loyola.

In the year 1949 the Chinese paid \$162,000 in film rental against \$124,000 for the Loyola, or that year a larger difference, a difference of \$38,000.

In the year 1950 the Chinese paid a total film

(Testimony of Cecil L. Dunn.)

rental of \$116,704 as against \$82,219 for the Loyola, or a difference of \$44,000.

Mr. Corinblit: What were those figures again, counsel?

Mr. Westbrook: I will pass the exhibits to you, counsel.

Mr. Corinblit: I am questioning your subtraction.

Mr. Westbrook: I will be glad—I am sorry, my [2611] subtraction is off. There is a difference of \$34,000. Thank you very much.

Mr. Corinblit: You are welcome.

Mr. Westbrook: Do you want to check the figures?

Mr. Corinblit: Yes, thanks.

Q. (By Mr. Westbrook): Now, Mr. Dunn, what is the significance of those film rentals in terms of comparison of your testimony with respect to the Loyola and Chinese profits this morning when his Honor asked you a question?

A. The significance of the film rentals, of course, is from the standpoint—is from the distributor's point of view the thing which he is trying to do—the thing which he is trying to do is to maximize the revenue which he gets from renting these films to all the various exhibitors.

In this instance, as I think Mr. Corinblit pointed out this morning, both of these theatres were in the control of the same management and played, I believe he told us, the same bills and consequently it represents a decision on the part of the management

(Testimony of Cecil L. Dunn.)

to divide up the revenue between those two theatres.

Q. Or whatever number they were playing.

A. Or whatever number were at that particular time playing these same programs.

If in their judgment of the situation as it existed in those years, and I am convinced that the economic situation [2612] which governs marketing decisions of every character was different in those years, they chose to make that distribution of availability with the expectation of getting more revenue out of it.

That was the decision for them to make. In any event, we have to assume that if they are choosing that pattern of distribution they are taking into account the fact that the various theatres to which these films are licensed on day and date availability will compete—will bite into the revenue which might be secured from other theatres playing the same bill.

Q. In any event, it is the film rental that ultimately determines the profit to the distributor.

A. The film rental determines the profitability to the distributor.

Q. All right. Now, what part does the profit of the theatre play in determining the desirability or undesirability of multiple runs from the economic point of view?

Mr. Corinblit: Object to that on the ground no foundation has been laid.

The Court: Objection overruled.

The Witness: Doesn't play any part at all be-

(Testimony of Cecil L. Dunn.)

yond the fact that the distributor wants the theatres to be sufficiently profitable so they will stay in business and give him an outlet for his product.

Q. (By Mr. Westbrook): All right. Now, this morning Mr. Corinblit asked you a whole lot of questions which were pretty "iffy" questions with regard to one week all the time.

We asked him to state the period of time he had reference to and he kept saying one week. [2614]

Now, I assume it is correct that in order to consider the over-all desirability of multiple runs there are other considerations other than one week's performance, is that right?

A. Certainly. I think the purport of my diagram which I keep drawing is that the thing in which you are interested is the total amount of revenue that you are going to get over the entire period that the film is available for distribution and not the amount that you are going to get in one week.

I can certainly imagine circumstances in which you could have a saturation short of distribution and get more money in the first week but that isn't what you are after. You are after the maximum total.

Q. All right. Now, with regard to the distinction between multiple runs and exclusive runs or one or two or at most three day and date runs, is there any distinction to be drawn with regard to the length of run?

A. Yes. I think there is in the exclusive run, and now I am speaking both from what I know as

(Testimony of Cecil L. Dunn.)

the ordinary observer of the motion picture market and from what I have been able to see from the play-off records, that in exclusive runs a single theatre or smaller number of theatres, the first run tends to be substantially longer than in the case of multiple first run. [2615]

If you put a film in a single theatre, particularly a downtown or Hollywood metropolitan theatre, a theatre which has prestige, advertise it aggressively, it can be for a long run, whereas dividing it up, divides up the total audience both from the point of space and in point of time and I think characteristically shortens the length of the first run considerably.

Q. What about the size of the drawing area of theatres playing multiple first run as affecting the length of the first run? Does that have any influence?

A. Yes, because a single theatre, particularly a show case theatre, so-called, will have a drawing area comprehending most of the Los Angeles market, whereas several theatres spotted regionally around the area will naturally draw from a smaller total area. There will be fewer people who are in that area who are prepared to pay first run prices and the length of the run will be accordingly shortened.

Q. Is the subject of theatre overhead—does the subject of theatre overhead have anything to do with the length of run?

A. Yes, I think it does when we consider the re-

(Testimony of Cecil L. Dunn.)

relationship between both the returns to the exhibitor, the theatre proprietor and the return to the distributor for his pictures is a situation in which a multiple first run is required to carry the overhead of, say, four, five or ten, to use the [2616] illustration we were talking about this morning, theatres rather than the overhead of a single theatre.

Obviously that is going to affect both of those factors. I keep returning to my conviction which I think the general practice of the industry bears out, that it is more profitable, certainly from the film distributor's standpoint, to license films for exclusive first run exhibition and then go through the series of steps than it is to use the multiple first run practice except in unusual circumstances.

Q. Can you illustrate simply the relationship of overhead to the length of run? A. Well—

Q. Let us assume first an exclusive first run and take a relatively high overhead theatre, say, a theatre with an overhead of \$8000 a week and contrast—

The Court: I am afraid this witness cannot do that.

The Witness: I am afraid—

The Court: This witness has no background for that question.

Mr. Westbrook: I think it is an economical question.

The Witness: I think an explanation could be developed but it might be a little labored.

Q. (By Mr. Westbrook): All right. Now, you

(Testimony of Cecil L. Dunn.)

have mentioned that multiple runs tend to be shorter by some considerable measure than exclusive runs. [2617]

Does that have any effect with regard to the overall performance of a picture from your viewpoint as an economic analyst?

A. Yes, I think it does. There is a great advantage in building up the reputation of a picture, a desire on the part of the public to see it arising from the exclusive first run, particularly to the show case type of showing.

People go to see it on what you might call special occasions. They come home and tell their neighbors about it. The general word of mouth advertising spreads the reputation of the picture and a desire on the part of theatre goers generally to see the picture.

It tends generally to be built up whereas when there is a short run or shorter multiple first run, that process of word of mouth advertising doesn't have the opportunity to grow and to have its effect upon the market for the picture which is the case when a longer first run exhibition is maintained.

Q. Now, does the length of the first run have anything to do with the total amount of revenue produced as on first runs as between multiple and exclusive runs?

A. Yes, when you consider the fact that a first run on an exclusive basis is bearing the overhead of a single theatre it might run for a considerable period of time and as compared to the length of

(Testimony of Cecil L. Dunn.)

runs in multiple first run showings, [2618] the return to the distributor will be considerably increased—I mean will be considerably greater in the first case. [2619]

Q. Now, again, from your experience as an economic analyst, does the concentration of gross admissions in one or two or three theatre outlets as distinguished from nine or ten or eleven, have anything to do with the ability of the distributor to earn film rental on his product?

Mr. Corinblit: Object to that, your Honor. No foundation laid.

The Court: I don't think that this witness has laid any foundation as to the problems of the distributor at all. He can give his opinion as to the location of the theatre and the number of people within the area, and so forth and so on, but now you are talking about an *entirely field*, the field of distribution of motion pictures. He is not a motion picture expert.

Mr. Westbrook: Talking about the economics of distribution, your Honor, which I don't think vary widely from one industry to another, except we are dealing with a unique problem here.

The Court: He testified he didn't go into the question of distribution before. He never looked into the question of distribution. He never examined the records. He knows what the general problem is.

Mr. Westbrook: Let me ask the question this way.

(Testimony of Cecil L. Dunn.)

Q. From a general economic point of view, Mr. Dunn, does the question of overhead of the outlet or outlets you suggest [2620] for your product as a distributor have anything to do with the rate of return on the total business that you can expect to realize?

Mr. Corinblit: Same objection, your Honor.

The Court: Well, that is already in the evidence that it does. Objection overruled. You can answer yes or no.

The Witness: Yes, it certainly does. I think that obviously the lower the relative amount of overhead, the greater the profitability. When you think of the fact that the longer run tends to reduce—the longer run in an exclusive theatre tends to reduce the proportion of overhead to gross revenue, there is a pretty obvious advantage there.

But then all of this, I think, relates to the general nature of the problem with which we are dealing. We talked a little bit about this yesterday, the exhibitor, the distributor of a motion picture is dealing with something which gathers a large, very large proportion of its value, if not all of its value, because it is unique. It isn't like the day-to-day goods that we contrasted it with. Whatever you can do to emphasize and, if you will, to capitalize upon the unique value of the thing you are selling in the way in which an exclusive first run showing does build up the unique value of a picture, you are doing something which is going to make more money. It adds to the attractiveness

(Testimony of Cecil L. Dunn.)

and the prestige [2621] and the reputation of a picture, and through this process of word of mouth advertising, it builds up the exhibitor's revenue, and with it the distributor's revenue considerably.

Q. (By Mr. Westbrook): From the point of view of your experience as a marketing analyst, does the use of multiple first run outlets scattered around the various regional centers you have drawn have any effect with regard to the subsequent exhibition of the picture?

Mr. Corinblit: I object to that, your Honor.

The Court: Now, I think we are getting clear outside the experience of this witness. Objection sustained.

Mr. Corinblit: Thank you.

Q. (By Mr. Westbrook): You mentioned this morning with Mr. Corinblit the proposition that putting multiple runs out in the outside areas might satisfy the convenience of some patrons out in those areas who wanted to attend the picture on first run.

Now, what effect does that have, if any—this is the testimony that Mr. Corinblit had you give—what effect does that have, if any, on the rest of the play-off of the motion picture?

A. Well, if they go—

Mr. Corinblit: Just a minute. Pardon me.

The Court: Same objection, same ruling.

Mr. Corinblit: Thank you, sir. [2622]

The Court: You will have plenty of witnesses here who are familiar with the motion picture busi-

(Testimony of Cecil L. Dunn.)

ness, who can testify from their own knowledge. This witness doesn't have any knowledge.

Mr. Westbrook: Well, I think he brings to bear expert opinion, your Honor, which qualifies him to answer the question.

The Court: His expert opinion is based, probably, on statements he received from the distributors and not from his own experience.

Mr. Corinblit: Or from distributors' counsel.

The Court: I think he is going outside the purview of his experience.

Mr. Westbrook: All right, sir.

Q. Mr. Corinblit asked you some questions, Mr. Dunn, about the effect of a survey which you had made of the Fox Inglewood Theatre in 1951, about the same time you made the Academy survey, which I believe the record shows was on a 14 day availability. A. That's right.

Q. Now, I would like to ask you, did you give consideration to introducing that survey into your study in this case? A. Yes, I did.

Q. As a matter of fact, you examined the survey during the course of your preparation to testify, did you not? A. Repeatedly. [2623]

Q. What was the reason that you decided not to bring it into your study at the present time?

Mr. Corinblit: Object to that, your Honor. What difference does it make why he decided not to bring it in? For reasons satisfactory to them they didn't put it in evidence.

Mr. Westbrook: That is exactly the inference

(Testimony of Cecil L. Dunn.)

counsel is trying to draw and I want to argue the inference, your Honor.

Mr. Corinblit: I object to that question.

The Court: The testimony is he made the survey. Sustained.

Mr. Westbrook: I trust, then, that Mr. Corinblit will not be able to argue our reasons for not bringing it in, your Honor. We are perfectly willing to have that reason stated by Mr. Dunn.

The Court: If Mr. Corinblit argues that, all you have to do is protest and I will tell Mr. Corinblit to stop arguing.

Mr. Westbrook: Thank you, your Honor.

Q. You testified generally as to the results of that survey under cross examination by Mr. Corinblit. I believe you made mention of an extension of the patronage pattern of the Inglewood Theatre down in the Hawthorne area.

A. Yes, I did. [2624]

Q. Were you aware of any particular geographic or other factors in the area at that time that in your judgment and opinion produced that result?

A. Yes, I am.

Q. Will you state what they were?

A. Well, essentially, I think they lie in the fact that along Market Street and Hawthorne Boulevard at that time the Los Angeles Transit Line streetcar system was operating. Hawthorne is a relatively, and in the adjacent territory, Lennox, and whatnot, is a relatively low income area as compared to some of the rest of this region, and I am

(Testimony of Cecil L. Dunn.)

inclined to believe it is accounted for by the fact that people here got on the streetcar or drove up Hawthorne Boulevard and went to theatres in downtown Inglewood.

Q. I believe when you testified you used reference to the four-mile radius as containing 80 to 85 per cent of the patronage in the Inglewood area with respect to the Fox Inglewood because of that southerly extension of patronage?

A. That is correct.

Q. If you exclude that southerly extension down Hawthorne Boulevard, within what radius would the bulk of the remaining patronage of the Fox Inglewood fall on that survey?

Mr. Corinblit: Your Honor, I object to that question as calling for a change in the witness' testimony. He has testified fully with respect to it.

The Court: Overruled.

Mr. Corinblit: He testified to the four-mile drawing area.

The Court: Overruled.

The Witness: Two to two and a half miles.

Q. (By Mr. Westbrook): Now, Mr. Dunn, Mr. Corinblit—first of all, let me ask you, do you remember the precise figures shown in the shaded area as being the area of greatest concentration of Fox Inglewood patronage on that survey?

A. No, I don't. It was in the vicinity of 45 per cent, I believe.

Q. To refresh your recollection as to the precise percentage, I show you a portion of your testimony

(Testimony of Cecil L. Dunn.)

appearing at page 3268 of the printed transcript in the Baldwin case, and ask you if that does further refresh your recollection.

A. Yes. It says right there. 45.8 per cent.

Q. Now, you testified that the percentage of concentration of the Academy Theatre patronage, as shown by the colored squares on this survey, was 27.1 per cent.

A. That's right.

Q. Now, what is the significance of those two different percentages of concentration in the shaded areas on the two surveys?

A. The Academy is twice as dispersed as is the patronage of the Fox Inglewood, roughly speaking, with 45.8 per [2626] cent in the shaded area, which was centered closely around the theatre. There is relatively twice as much as when we have 27.1 per cent concentrated that way, which supports my contention that the four mile circle which I drew then was primarily in consideration of the unusual southern extension, and if that had been eliminated, certainly a two to two and a half mile circle would have contained a very large proportion of the total patronage of the Fox Inglewood Theatre.

Mr. Westbrook: No further questions, your Honor.

The Court: Any other questions, Mr. Corinblit?

Mr. Corinblit: Just a couple.

The Court: I would like to get rid of this witness this afternoon.

Mr. Corinblit: Yes, sir.

(Testimony of Cecil L. Dunn.)

The Court: I hope you won't bring up any new subjects.

Mr. Corinblit: I won't. There are just one or two things.

Recross Examination

Q. (By Mr. Corinblit): Mr. Dunn, I think you said that when the Fox people decided to play the Chinese and the Loyola day and date, they decided, in effect, to divide up the patronage, the first run patronage, between those two theatres and whatever [2627] theatres were playing day and date, is that what you said?

A. I meant to imply they should have taken into account the probability of some division of patronage.

Q. Let's put it this way. If the Chinese Theatre was doing a half million in gross and the Loyola Theatre was doing 350,000 in gross, you say what they did was decide to divide up that 850,000 gross between the two theatres?

Mr. Mitchell: We have the figures here, your Honor, and I object to the iffy question on the ground it is argumentative and a hypothetical question.

The Court: It is argumentative.

Mr. Corinblit: The Chinese gross in 1950 was 432,000 and the Loyola gross in 1950 was 272,000. 432 and 270——

The Witness: 690.

Mr. Corinblit: 700,000.

The Court: Do I understand you to mean that

(Testimony of Cecil L. Dunn.)

if the picture only played in the Chinese Theatre, the Chinese Theatre would have taken in the entire \$700,000?

The Witness: Oh, no, not at all, but if it——

The Court: Well, assuming the potential was \$700,000, instead of getting the potential in one theatre, you got it in two theatres, is that what you are trying to tell us?

The Witness: No. I am simply saying when they [2628] decided to do that, they had to make up their minds how they wanted to get the revenue.

Q. (By Mr. Corinblit): They couldn't have got the 700,000 in the Chinese playing alone——

The Court: Now, that is speculation.

Mr. Corinblit: But this witness testified that the——

The Court: Now, this is too late in the afternoon to start an argument.

Mr. Corinblit: Let me just get these two points.

The Witness: The answer is yes, they could have.

Q. (By Mr. Corinblit): I beg your pardon?

A. Yes, they could have.

Q. The Chinese could have drawn \$700,000?

A. In all probability, if they had played exclusive runs instead of licensing them all around town the way they did. [2629]

Q. Now, just one question.

You testified this morning that the Loyola Theatre draw is four miles. A. That is right.

Q. Four miles. Now, 270,000 is almost—let me see, was almost $\frac{3}{7}$ of the total gross here.

(Testimony of Cecil L. Dunn.)

A. May I show you something on the map.

Q. If you will let me finish.

Mr. Mitchell: If he would just ask a question instead of arguing with the witness we might get through some time.

The Witness: Go ahead.

Q. (By Mr. Corinblit): Just the one question.

Now, you testified the Loyola area as being four miles.

Now, I ask you—you took a survey in the Mar-coy case.

A. Right.

Q. And you know how many people from the Westchester, the four-mile area, went downtown and you know it is nowhere near 40 per cent of the total grossing, to the Chinese Theatre from that area, so in the light of that wouldn't you testify that it would be impossible for the Chinese Theatre to draw that 300,000 people from the Loyola area and what Twentieth Century-Fox did in fact was to draw revenue into the first-run theatre.

The Court: Mr. Corinblit, you are arguing the case. The witness testified as to his opinion, and [2630] that was that the Chinese could have gotten it all. You can argue your side of the problem to the jury, but not to the witness.

Mr. Corinblit: All right. No further questions.

The Court: You are not going to convince the witness and I don't know whether you are going to convince the jury.

(Testimony of Cecil L. Dunn.)

The Witness: Mr. Corinblit raises the question——

Mr. Mitchell: Just a moment.

The Court: Just a minute. If you want to argue with Mr. Corinblit——

The Witness: No, no. I just want to show him something which I think will be useful to him.

The Court: The witness is excused. I am trying to save you another per diem.

Mr. Corinblit, may this witness be excused?

Mr. Corinblit: Yes.

The Court: You may be excused.

(Witness excused.) [2631]

* * * * *

FRED GREENBERG

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: You may be seated. Will you state your name, please, sir?

The Witness: Fred Greenberg.

Direct Examination

Q. (By Mr. Mitchell): Mr. Greenberg, you are employed by Warner Bros. Pictures Distributing Corporation? [2636] A. Yes, sir.

Q. What is your present job there, Mr. Greenberg?

A. I am presently employed as the district manager.

Q. What does that mean?

(Testimony of Fred Greenberg.)

A. It means that I have supervision over the West Coast offices, six offices.

Q. For how long have you held that position?

A. Just two weeks.

Q. Prior to that time, what was your job there?

A. Branch manager of the Los Angeles exchange.

Q. And how long had you been branch manager?

A. Oh, about 14 years.

Q. So that you were the branch manager of the Los Angeles exchange area in 1950 and 1951?

A. I was.

Q. Who was the district manager at that time?

A. Henry Herbel.

Q. And Henry Herbel is now deceased?

A. He is.

Q. When did he die, Mr. Greenberg?

A. Oh, about a year or so ago.

Q. Now, in 1950 and 1951, did Warner Bros. own theatres in Hollywood, downtown Los Angeles and on Wilshire Boulevard?

A. Yes, sir. [2637]

Q. What were the names of those theatres?

A. The Warner's Downtown, the Wiltern on Wilshire, and the Warner's Hollywood on Hollywood Boulevard.

Q. The Warner's Downtown is located, is and was located at Seventh and Hill Streets?

A. That's right.

Q. And the Wiltern is located where?

A. Corner of Western and Wilshire.

(Testimony of Fred Greenberg.)

Q. And the Warner's Hollywood is located where?

A. You have me. It is on Hollywood Boulevard, but I don't know what the intersecting street is.

Q. What is the size of those theatres, approximately?

A. Oh, approximately 2,000 seats or better each.

Q. In 1950 and 1951, when your company owned those theatres, how did you license your first run Los Angeles pictures?

A. To those three theatres.

Q. And why did you do that?

A. We owned them.

Q. What difference does that make to you?

A. Well, of course, the profit motive might have been very much a contributing factor, but we used them for more purposes than that. We used them for what we call show case theatres, to establish the picture for not only this immediate territory, but the United States market, and for that [2638] matter the world market.

Q. In determining how long your pictures would play and when they would play, was there any advantage to you to have your own theatres exhibit the pictures? A. Obviously.

Q. In what way?

A. Well, we had control of the length of time, we controlled the houses because of our inter-relationship with our subsidiary, and we could, of course, demand and get—well, without really de-

(Testimony of Fred Greenberg.)

manding, but I mean we actually got what we wanted insofar as length of time.

Q. Why didn't you license first run to other theatres day and date in the suburban areas or in urban Los Angeles or elsewhere in this metropolitan area?

A. Well, it seems quite obvious that it was to our advantage, inasmuch as we were getting the profit from not only distribution, but also exhibition, having our own pictures in our own theatres and being able to present them to the public in our own way.

Q. What effect do you think or did you think that licensing a number of day and dates with the three Warner theatres would have on the Warner theatres receipts?

A. Unquestionably the receipts of the Warner theatres would be diminished.

Q. From what area did those Warner theatres draw at that time? [2639]

A. Well, from the greater Los Angeles area. It could extend into the surrounding towns, wherever people came into the showcases. They naturally would like to go to theatres such as we had on Hollywood Boulevard, which is a famous theatre all over the United States, well known, established as a show case house. We had our premieres there, stars were attracted there, and people from out of town would naturally want to see those theatres about which they had been reading and hearing.

Q. The record shows, Mr. Greenberg, that dur-

(Testimony of Fred Greenberg.)

ing 1950 and 1951, Warner Bros. did not license any of its pictures whatsoever to the Loyola, and that the only pictures ever licensed to the Loyola were two in 1949, *One Last Fling* and *House Across the Street*. What was the caliber of those pictures?

A. Well, of course, they were—if you want the parlance of the trade, they were dogs. They were just inferior pictures.

Q. The record also shows, Plaintiff's Exhibit No. 53, that these two pictures played at the Loyola on the lower half of the double bill.

I will show you for the purpose of refreshing your recollection two booker's work sheets and ask you, by referring to these, if you can tell me what film rental was paid [2640] for the use of those pictures at the Loyola.

A. *One Last Fling*, \$250, and \$250 for *House Across the Street*.

Q. That is a flat rental? A. That's right.

Q. Does that sort of a flat rental of \$250 mean anything with respect to the quality of the picture?

A. It certainly does because generally on a top picture—not generally, but we always get percentage terms.

Q. Why did you license those two pictures to the Loyola?

A. To recover as much money as we could, salvage.

Q. Why didn't you play them in the three show cases?

A. It would have been asking the public just a

(Testimony of Fred Greenberg.)

bit too much to pay the prices we demand in those first run houses for pictures of that caliber.

Q. In confining your licensing of first run Los Angeles pictures during this period to the three 2,000-seat Warner theatres, was that done as a result of any arrangement or understanding or conspiracy, combination or agreement with Loew's or Fox or Fox West Coast, or Universal, or Paramount? A. Nor anybody else.

Q. Now, your company licensed pictures on a 7 day availability at that time, Mr. Greenberg?

A. Yes, sir, in some communities. [2641]

Q. Where did you license at that time 7 day availabilities?

A. Pasadena, Glendale, Inglewood, Huntington Park—I believe that's it.

Q. How many did you license in Pasadena?

A. One.

Q. And in—— A. One each at that time.

Q. We will come to Inglewood in a few moments. A. I see.

Q. One in Pasadena. How many in Glendale?

A. One.

Q. How many in Huntington Park?

A. One.

Q. Now, turning to the period 1950 and 1951, in Inglewood how many 7 day availabilities did you license?

A. Two, I believe, at that time. I would have to have my memory refreshed, because we have

(Testimony of Fred Greenberg.)

made a few changes in 1950 and 1951. I am inclined to think we had two during that period.

Q. I think we can develop that with you.

The Clerk: Warner's Exhibit I-1 for identification.

(The exhibit referred to was marked as Warner's Exhibit I-1 for identification.)

Q. (By Mr. Mitchell): I would like to show [2642] you two documents, one marked Warner Bros. I-1 and one marked Warner Bros. G-3, and ask you if you received Exhibit I-1 on or about April 26, 1950, and you sent the reply on or about April 27, 1950. A. Yes.

Mr. Mitchell: I will offer these in evidence, your Honor.

The Court: In evidence.

The Clerk: Warner's Exhibits G-3 and I-1.

(The exhibits referred to were received in evidence and marked as Warner's Exhibits G-3 and I-1.) [2643]

* * * * *

Q. (By Mr. Mitchell): Now, in order to establish another date in this period, Mr. Greenberg, I will show you a document marked Defendants' Exhibit G-5 and another marked Defendants' Exhibit G-6. G-5 is dated 5 September 1950, and the G-6 is dated May 17, 1951. I will ask you if you received the September 5 letter on or about that date from Mr. Kupper. A. I did.

Q. And ask you if you made this—

(Testimony of Fred Greenberg.)

A. This one is addressed to Mr. Herbel but, of course, was referred to me.

Q. There is a memorandum dated May 17, 1951, which is marked Defendants' Exhibit G-6. That is your memorandum?

A. Yes, sir.

Mr. Mitchell: I will offer these in evidence, your Honor. [2644]

The Court: In evidence.

The Clerk: They have already been marked in evidence, as far as my record shows.

Mr. Mitchell: You are right.

The Court: Are they already in evidence?

Mr. Mitchell: Yes. I didn't look at the back of them. [2645]

* * * * *

Q. Those are your initials? A. Yes.

Q. Now, prior to Mr. Kupper's request for bidding in the Inglewood area, how were you carrying on your attempts to get offers for the 7 day availability in that area?

A. We were offering our pictures to everyone in the area who would be interested.

Q. How did you go about that, Mr. Greenberg?

A. Call these accounts either in person or by phone, generally by phone, to offer to negotiate to market our product.

Q. Now, this is a period prior to September 1950, and except for a one-week period there, the Paradise, I call your attention to the fact that the Paradise was not in existence as an operating theatre, so can you tell me with whom Warner [2646]

(Testimony of Fred Greenberg.)

Bros. was negotiating with respect to the 7 day availability?

A. The Academy or the La Tijera, Imperial, I don't remember all the theatres that we negotiated with, but those stand out. Probably some pictures went to the United Artists.

Q. Southside?

A. Yes, we sold pictures to the Southside.

Q. Rio? A. Yes, Rio.

Q. Whether you sold them or not, did you solicit offers?

A. We solicited offers, certainly.

Q. Imperial?

A. Imperial. That was a part of Kupper's.

Q. Now, during this period prior to Mr. Kupper's request for bidding, as covering that period, I will show you a schedule of pictures and ask you whether or not you have checked this to ascertain whether this is the correct schedule of the theatres that played your pictures between May 1, 1950, and September 4, 1950, on the 7 day availability in the Inglewood-Westchester area. A. Yes, sir.

Mr. Mitchell: I will offer this in evidence, your Honor.

The Court: In evidence.

The Clerk: Warner's Exhibit I-2. [2647]

(The exhibit referred to was received in evidence and marked as Warner's Exhibit I-2.)

* * * * *

Q. (By Mr. Mitchell): Now, when you say, Mr. Greenberg, that you during that period negotiated

(Testimony of Fred Greenberg.)

by having your bookers or salesmen — not your bookers, but your salesmen contact these accounts, just tell me what you would do after you had contacted the accounts, how would you determine to which theatre or theatres to license the picture?

A. We determined that very much by the interests of the individual account and, of course, what we felt the returns to the company would be in each case.

Q. Well, in negotiating did the fact that one exhibitor made an offer which would return you a greater amount of film rental than the other have anything to do with which theatre you awarded it to? A. Certainly.

Q. What did that have to do with it?

A. It would have this to do with it. That was the deal that we would prefer to take and usually did.

Q. Now, with respect to these three pictures, these three Warner pictures that were licensed to the Paradise at the time of the Paradise opening, did you personally have anything to do with licensing those pictures to the Paradise? [2649]

A. No, I did not.

Q. Who did, so far as you know?

A. Mr. Herbel did.

Q. Did Mr. Herbel have some sort of a relationship with Mr. Marco Wolff?

Mr. Corinblit: Object to that, your Honor, as calling for a conclusion. What kind of relationship?

(Testimony of Fred Greenberg.)

Mr. Mitchell: I don't mean exactly that.

Q. Was there a personal situation between Marco and Mr. Herbel?

Mr. Corinblit: Now, your Honor, I will make the same objection to that.

The Court: I think it is purely a conclusion of the witness.

Mr. Mitchell: All right. I will ask it another way.

Q. Where did Marco have a ranch and where did Mr. Herbel have a ranch?

Mr. Corinblit: I object to that. What difference does it make?

The Court: Do you know of your own knowledge whether Mr. Herbel and Mr. Marco were friends?

The Witness: Yes, I do, of my own knowledge. They were very good friends. Not only because of their association in the motion picture business for [2650] many, many years—Mr. Herbel had quite a background in this business that extended over a good many years, through which time, of course, he came in contact with Mr. Wolff, but they both had rather nice ranches on Devonshire. They were neighbors. They lived near Chatsworth. Their families were out there.

I know that they had social contacts other than business contacts. They were very good friends. They had a great deal of respect for each other.

Q. (By Mr. Mitchell): All right. Now, with respect to the method of licensing after Mr. Kupper

(Testimony of Fred Greenberg.)

requested that he have an opportunity to bid for your product, then how did you go about licensing your pictures in the Inglewood area on 7 day availability?

A. We sent formal bid forms to each account in the general area. [2651]

Mr. Corinblit: May we have a definition of "general area"?

The Witness: In the Inglewood competitive area.

Q. (By Mr. Mitchell): I am going to introduce into evidence the bid forms themselves, the request for offers which will show the theatres to whom requests were sent.

The Court: May I ask this witness a question?

Mr. Mitchell: Yes.

The Court: There is bidding and negotiation for pictures?

The Witness: Yes.

The Court: Which does a distributor prefer to do, license pictures on a bid or negotiate for them?

The Witness: Well, as a distributor and to simplify matters, I would rather bid.

The Court: You got a request to bid and you established bidding?

The Witness: That is right.

The Court: You think bidding is preferable to negotiation?

The Witness: Well, from a point of view of one who wants to make his job a little bit easier, yes.

Q. (By Mr. Mitchell): Well, I think you had better explain what you mean.

(Testimony of Fred Greenberg.)

A. Well, when an account bids and they establish exactly what they want to pay for the film, [2652] we merely are then required to evaluate on the basis of what they submit as their offer which one to be the best. We open them up and then we give the picture to whatever account it was made—that is, that made the best offer.

The Court: Purely a dollar and cents proposition?

The Witness: That is what it is. That is what this business is.

Q. (By Mr. Mitchell): And how does it differ on negotiation?

A. It differs only in this way, that in negotiations when we establish certain terms for our pictures, and if that picture doesn't do as well as expected very often we are required and do make adjustments, but when a bid is submitted, when it is in competition with others who have made honest bids, we consider the deal is closed. There is no adjustment or no consideration given, of course, because that would be to the detriment of the others—to the disadvantage of the losing bidder.

Q. You mean if you made an adjustment with the high bidder, he might come out paying less than some other fellow who had offered to pay, is that what you mean? A. No.

Q. Well, supposing you make—supposing you were to make an adjustment with the highest bidder, couldn't it happen that you, if you should follow such a practice, that you would come [2653]

(Testimony of Fred Greenberg.)

out by letting him have the picture for less than some other fellow had offered?

Mr. Corinblit: I will object to that.

The Witness: Except——

Mr. Corinblit: I will object to that as being leading and suggestive.

The Court: Overruled.

The Witness: Except that flatly we would not give a bid any adjustment or further consideration whatever. He writes down on that bid that we have accepted what his deal is and we expect him to pay off just that way.

Q. (By Mr. Mitchell): Under your method of operation was an exhibitor permitted to withdraw his bid before it was accepted?

A. Certainly, at any time before it was accepted.

The Court: After it was accepted, he couldn't withdraw?

The Witness: That is right. If he had the winning bid he couldn't withdraw.

Q. (By Mr. Mitchell): I think the best way to handle this would be to mark for identification—I will show you a group of—(handing documents to Mr. Corinblit).

I will show you a large group of competitive bid applications which have already been marked for identification and ask you if you recognize those as being your company's form of bid applications?

A. They are. [2654]

Mr. Mitchell: All right. I would like to offer

(Testimony of Fred Greenberg.)

these in evidence, your Honor, and they are all marked for identification.

In order to save time now, may I not go ahead rather than have to stop and have all of these marked?

Mr. Corinblit: There is one I would like to get straight. I understand that they are not all present. I understand some of them are lost. Do you have a list of those that are lost?

Mr. Mitchell: I can give you those as we go along. There are just a few.

Mr. Corinblit: Subject to that we have no objection.

The Court: They may be received in evidence.

The Clerk: Warner's Exhibits H-2 to H-22, inclusive.

(The exhibits referred to were marked Warner's Exhibits H-2 to H-22, and received in evidence.)

Mr. Mitchell: Now, there are already in evidence, your Honor, some stray bid applications here. They are Plaintiff's Exhibit 10-J, 10-N and 10-P and also Warner's H-1.

I think with those we have all the bid applications in. Will you pardon me just a moment, your Honor, until I get these in shape. I didn't want to put these few that have been introduced in with the others until we have the problem straightened out and I would like to do that now so I can show them to the witness. [2655]

Q. Now, using these competitive bid applications

(Testimony of Fred Greenberg.)

which I will place before you—and I think I have them in order so that we will not get too confused, I would like to have you tell the jury to what theatres you sent applications—application forms on the picture *Breaking Point* in September 1950.

A. To the Paradise, United Artists, Fox, the Imperial, La Tijera. That is it.

Q. Now, when you say Fox, you mean you sent one application form to Fox which would include the Fox theatres, the Fifth Avenue and Academy?

A. That is right. And then they scratch out in the event that they do make an offer, they scratch out the theatres that they don't want the bid for, and leave the other one there, the one that they are actively bidding for unmarked.

Mr. Mitchell: Now, Mr. Corinblit, we have other information that indicates an application was sent to the Southside, but that application seems to be missing.

Mr. Corinblit: I understand you have that information but I would be glad to see it.

Q. (By Mr. Mitchell): Do you remember whether or not an application was also sent to the Southside in each of these instances?

A. It undoubtedly was because in the clearance [2656] as indicated on this bidding form, on each one of them, this clearance reads: "7 days following Los Angeles first run closing, clear of Fox, United Artists, Inglewood, La Tijera, Southside, Los Angeles, and Paradise."

Mr. Corinblit: Your Honor, I wonder if we

(Testimony of Fred Greenberg.)

could have this witness tell us whether or not he knows positively that that is so—that he has a recollection that those things went out to the Southside. That is all I want to know.

Mr. Mitchell: You heard his testimony as well as I.

Mr. Corinblit: I move to strike it.

Mr. Mitchell: There won't be any more Southside applications missing so we will continue and you can argue with him about his recollection on this one picture, if it is important.

Q. Does your record show—do your records there show which theatres submitted offers on Breaking Point?

A. Well, the Paradise made an offer. United Artists made an offer. Fox made an offer.

Q. For what theatre?

A. I can't tell. This "rejected" stamp over the Fifth Avenue—it doesn't indicate here. I can't tell from this.

Q. All right.

A. The Imperial made an offer. The La Tijera made an offer.

Q. All right. Now, let us turn to the next [2657] picture, Three Secrets also in September 1950. To which theatres did you send applications for bids?

A. The Academy, the Paradise, United Artists, La Tijera, the Imperial and Southside.

Q. And which theatres sent in bids?

A. The Academy submitted a bid. The Paradise

(Testimony of Fred Greenberg.)

submitted a bid. United Artists submitted a bid, and so did the La Tijera.

Q. The Imperial and the Southside submitted no bid? A. That is right.

Q. Now let us turn to the next picture in October 1950, Rocky Mountain and tell me which theatres were sent applications for bids?

A. The Paradise, the Academy, the United Artists, the Southside, the Imperial, the La Tijera.

Q. And which theatres submitted bids?

A. The Paradise submitted a bid. The Academy, the United Artists did not submit a bid. And neither did the Southside. The Imperial submitted a bid.

Q. How about the La Tijera?

A. The La Tijera submitted a bid.

Q. All right. Now, the next picture is Glass Menagerie. Which theatres were applications for bids sent?

A. The Paradise, the Academy, the United Artists, La Tijera, Imperial and the Southside. [2658]

Q. And which theatres submitted bids?

A. The Paradise, the Academy, the United Artists did not submit a bid. La Tijera submitted a bid. The Imperial submitted a bid and the Southside did not submit a bid.

Q. All right. On the picture Break Through—perhaps we would save time if we were to do both operations at once, telling which theatres were sent offers and which submitted bids.

A. The Paradise submitted a bid. The Academy

(Testimony of Fred Greenberg.)

submitted a bid. The United Artists submitted a bid. The La Tijera submitted a bid as did the Imperial. The Southside did not submit a bid.

Q. And when you say they did not, you mean you sent them applications but they didn't choose to submit a bid? A. That is right.

Q. All right. Let us take the next picture West Point Story and do the same thing.

A. To clarify that, they probably returned the bid and indicated across the face of it they were not interested and did not bid.

Mr. Corinblit: Your Honor, I move to strike that answer.

The Court: That may go out.

Mr. Corinblit: As a voluntary statement.

The Court: Apparently it is.

Q. (By Mr. Mitchell): Do you have the [2659] Southside bid application there?

A. It says "No bid" across the face of it which indicates, of course, that the account wrote down "No bid."

Mr. Corinblit: Your Honor, I move to strike that answer as being a supposition. If Mr. Greenberg's own records show there was no bid, that is all right, but that is a stamp put on by Warners and I take it he doesn't have any statement in the file from the Southside Theatre, is that correct?

The Witness: No, that is not correct.

Mr. Corinblit: All right. Let us have the testimony.

The Witness: When we submit bids to these

(Testimony of Fred Greenberg.)

various accounts, they indicate that they are not interested in the picture by writing across the face of it, "No bid" or "Not interested at this time," or whatever they care to say.

The Court: They write across the application "No bid" and send it back to you?

The Witness: They send the bid back in most instances. In this case they did send it back "No bid."

Mr. Corinblit: All right.

Q. (By Mr. Mitchell): All right. Let us take the next picture, West Point Story and do the same thing. That was in November 1950.

A. The Academy submitted a bid. So did the United Artists. So did the Imperial. So did the La Tijera. The Southside did not nor did the Paradise. [2660]

Q. The Paradise was sent an application for a bid? A. Yes.

The Court: Was the application sent to the Paradise returned to you?

The Witness: There is no marking at all on this return. Evidently he did not—I don't know.

Q. (By Mr. Mitchell): Does your Paradise bid application contain any signature or marking on it at all? A. No.

Q. And your Southside application has in pencil— A. Across the face of it.

Q. A striking line across it with a handwritten "No bid"? A. That is right.

(Testimony of Fred Greenberg.)

Mr. Corinblit: Could you identify the handwriting, Mr. Mitchell?

The Witness: Could I?

Q. (By Mr. Mitchell): Are you able to identify that handwriting? A. No, I am not.

Mr. Corinblit: His testimony is this is Warner's?

Mr. Mitchell: He said, "No, I am not."

Q. The next picture which is in December 1950 is Highway 301. What theatres were applications for bids sent to and which theatres put in bids and what did the others do? [2661]

A. The Imperial bid. The La Tijera bid. The Southside did not. The United Artists did not. The Academy did. The Paradise did not.

Q. And the Paradise was sent an offer?

A. No offer.

Q. I say it was sent an application?

A. Yes, sir.

Q. All right. The next picture is Dallas in December 1950. What theatres were applications sent to and which ones bid?

A. The Academy submitted a bid. The United Artists submitted a bid. The Southside did not submit a bid. The Imperial submitted a bid and so did the La Tijera. The Paradise did not.

Q. All right. The next picture is Operation Pacific and the same question.

A. The Academy submitted a bid. The United Artists submitted a bid and so did the La Tijera. The Imperial submitted a bid. The Southside did not and neither did the Paradise.

(Testimony of Fred Greenberg.)

Q. The next one is Storm Warning in 1951.

A. Storm Warning. The Academy indicated "No offer at this time." The United Artists submitted a bid. The Imperial made no offer. And neither did the La Tijera. Neither did the Southside and neither did the Paradise. [2662]

Q. The Paradise was sent an application?

A. It was.

Q. That was Storm Warning? A. Yes, sir.

Q. The next one, Enforcer in February 1951 and the same question.

A. The Academy submitted a bid. The Southside did not. The La Tijera did not. The Imperial did not. The United Artists did not. And neither did the Paradise.

Q. All right. The next one is Raton Pass. As I understand it, the natives call it Ratoon.

A. The Fox submitted a bid. United Artists did not. The Southside did not. The La Tijera did not nor did the Imperial nor did the Paradise. They were sent a bid. [2663]

Q. All right. The next picture, I guess, are joint pictures, Dodge City and Virginia City. Is that a joint bill or something?

A. They are what we call a re-issue combination. They are old pictures that were brought back in combination because of their star value to make a bill.

Q. All right. The same question as to those pictures.

A. The Academy made no bid. The United Art-

(Testimony of Fred Greenberg.)

ists made no offer. The La Tijera did not, nor did the Imperial, nor did the Southside, nor did the Paradise.

Q. You received no bids on that combination?

A. No, sir.

Q. All right. Now, the next picture in March 1951 is Lullabye of Broadway.

A. The Academy submitted a bid. The United Artists did not. Nor did the La Tijera, nor did the Imperial, nor the Southside, nor the Paradise.

Q. Although the Paradise received an application?
A. Yes, sir.

Q. The next picture is Sugar Foot in March 1951.

A. Imperial did not submit a bid. The Southside did not submit a bid, nor did the La Tijera. United Artists submitted a bid. The Paradise did not.

Q. In each instance all these theatres that you are naming were sent applications for offers?

A. That's right. Every one of these theatres in every case received the same sort of bid form.

Q. Did you mention the Academy there receiving an offer on Sugar Foot?

A. They received one, but they did not return it.

Q. All right. The next picture, which is in April 1951, is Only the Valiant. Same question.

A. The Academy submitted a bid. United Artists did not. Imperial did not. La Tijera did not, nor did the Paradise.

Mr. Corinblit: How about the Southside?

(Testimony of Fred Greenberg.)

The Witness: If they did, they didn't return it. I have no record of it here.

Q. (By Mr. Mitchell): You have no record of the Southside?

A. They were mailed one, just as the other theatres. Well, there is no indication that the Southside was sent a bid on this particular picture.

Q. The next picture is Communist for the FBI in April 1951. Same question.

A. The Academy made no offer. The United Artists made no offer and the Paradise made no offer. That's all I have that has been returned.

Q. All right. The next picture in April 1951 is Goodbye My Fancy. Same question.

A. The Academy made no offer. United Artists [2665] made an offer. La Tijera made no offer. Imperial made no offer. The Paradise made no offer.

Mr. Corinblit: Southside?

The Witness: They are not indicated. They are not on this bid form.

Q. (By Mr. Mitchell): Next picture is Along the Great Divide in May 1951.

A. The Academy made no offer, neither did the United Artists nor the La Tijera, nor the Imperial, nor the Paradise. That is the only returned offers I have.

Q. All those that you have there were sent bid applications? A. Yes, sir.

Mr. Corinblit: Just a minute. May I take a look at the last bid form, please?

Mr. Mitchell: Yes, sir.

(Testimony of Fred Greenberg.)

Mr. Corinblit: Thank you.

Q. (By Mr. Mitchell): During this bidding period between about September 1, 1950, and May 9, 1951, when one of the theatres made the highest bid, then what would you do?

A. We would award the picture to the highest bidder and notify the other bidders, or contestants, whatever you call them, that their offers were rejected.

Q. Well, what about the matter of exclusivity of that highest bidder, or the loosely termed clearance, priority of [2666] availability, how did you handle that?

A. It was handled in this manner. The man indicated on his bid form the clearance that he required to be considered as a part of his bid. He would indicate on this form that he wanted clearance over whatever theatres he felt was in competition with him.

Q. Did you sometimes license a second and sometimes a third and even fourth 7 day run in this area?

A. During that period?

Q. During that period.

A. I would have to refresh my mind on that, Mr. Mitchell. When you get me into periods, I would have to look at the records.

The Court: Mr. Mitchell, it is nearly 11:00 o'clock.

Mr. Mitchell: All right.

The Court: While you are looking for that data, we will take the morning recess.

(Testimony of Fred Greenberg.)

Mr. Mitchell: All right, sir.

The Court: Ladies and gentlemen of the jury, we are about to take another recess. Again it is my duty to admonish you that you are not to discuss this case with anyone, you are not to allow anyone to discuss it with you, and you are not to formulate or express any opinion as to the rights of the parties until the case is finally submitted to you. [2667]

With that admonition, we will now recess until 15 minutes after 11:00.

(Recess.)

The Court: Is it stipulated the jury is present in the box?

Mr. Corinblit: So stipulated, your Honor.

Mr. Mitchell: Yes, sir.

The Court: You may proceed.

Q. (By Mr. Mitchell): Mr. Greenberg, through the use of the cut-off cards which are in evidence, I would like to develop the method of play and film rental for three pictures. Let's start with The Enforcer.

Mr. Mitchell: Will you furnish the cut-off card for The Enforcer on the United Artists Theatre to the witness, Mr. Westbrook?

(Mr. Westbrook handing document to witness.)

The Witness: The Enforcer?

Q. (By Mr. Mitchell): Yes. I want the film rental paid by the United Artists on The Enforcer for the 7 day run. A. \$793.43.

(Testimony of Fred Greenberg.)

Q. Now, you also played *The Enforcer* on a 7 day run in the La Tijera. Will you give me the film rental on that? A. \$789.17.

Q. Also at the Imperial?

A. \$782.54. [2668]

Q. And also the Southside? A. \$719.18.

Q. Now, can you tell me from the cut-off card there whether you had a 14 day run?

A. You say 14? You are not interested in the later runs?

Q. Yes, I am interested in the later ones. I want to see what *The Enforcer* made in the Inglewood-Westchester area, so if you have got a later one, give me that.

A. All right. At the Century Drive-In on the 21 days, we got \$250, and at the Paradise \$200.

Q. On the 21 day availability?

A. Yes, sir.

Q. That was your play-off in the Inglewood-Westchester area of *The Enforcer*?

A. On *The Enforcer*.

Mr. Mitchell: The records which we have here available to both counsel show that the national gross on that picture was \$1,449,000 and the Los Angeles exchange territory gross was \$85,000.

Is it necessary for me to read from the records into the record here?

Mr. Corinblit: Do you have them in front of you?

Mr. Mitchell: I don't have them in front of me.

Mr. Corinblit: You go ahead and I will check.

(Testimony of Fred Greenberg.)

Mr. Mitchell: Subject to check, will you agree the records so show?

Mr. Corinblit: Yes, sir.

Q. (By Mr. Mitchell): I would like to take the picture—excuse me just a minute, withdraw that. On the picture Enforcer, you then played four day and date 7 day runs in the Inglewood area.

A. That's right.

Q. When you testified you said that the Academy was the only theatre to make a bid on that picture, just tell us how you went about arranging with these four theatres to play, and what you did about the Academy.

A. I would like to look at those bids on that picture.

Q. That is in February 1951, about.

A. Was that on the 7 day availability that you had that saturation booking?

Q. Yes. You have just consulted your cut-off cards on that.

A. That bid was rejected. The bid to the Academy was rejected and we negotiated with those four theatres.

Q. When you go about negotiating after you have rejected a bid, how do you go about it?

A. We call on every one of the accounts in the area and offer them the picture, trying to secure the best terms on a saturated booking. [2670]

Q. In this instance on a saturated booking?

A. Yes, sir.

Q. Let's take the picture Goodbye My Fancy,

(Testimony of Fred Greenberg.)

which I think you will find played in the La Tijera, Southside and United Artists.

A. We earned on Goodbye My Fancy at the La Tijera \$780.70.

Q. 787?

A. No, \$780.70. At the United Artists we earned \$623.78. At the Southside we earned \$400.

Mr. Mitchell: Now, will you stipulate, Mr. Corinblit, subject to correction, that the national gross on that picture was \$1,046,000 and the Los Angeles exchange area gross was 57,000.

Mr. Corinblit: What was the figure?

Mr. Mitchell: Pardon me?

Mr. Corinblit: 57 and 1 million?

Mr. Westbrook: 1,046,000 on the national rental, and 57,000 on the Los Angeles exchange territory rental.

Mr. Corinblit: Right. [2671]

At the Imperial we earned \$490.62 — oh, I am sorry. That is the gross.

Q. (By Mr. Mitchell): You have some more play-off there — these three on 7 day availability here—United Artists and Southside.

A. That is right.

Q. All right. Now, what additional play-offs do you have?

A. At the Imperial we earned \$136.72.

Q. \$176.32? A. That is correct.

Q. Which is it 136 or 176?

A. Let me look back. I will read it to you again. It is \$136.72.

(Testimony of Fred Greenberg.)

Mr. Mitchell: I transposed the figures.

Q. All right. Now, was there any other play-off on that picture in the Inglewood-Westchester area?

A. That was all.

Q. All right. Now, in that instance where you licensed three day and date 7 day availabilities, will you check your bid records there and see whether a bid was rejected. I believe you said it was the United Artists bid.

A. What picture was that, Mr. Mitchell?

Q. Goodbye My Fancy. That was in about April 1951, toward the last of your papers there. [2672]

A. The United Artists bid was rejected.

Q. And then in that instance how did you go about getting a theatre or theatres in which to play your picture?

A. Solicited them all. Tried to sell them the picture.

Q. Including the Paradise?

A. Including every theatre that we have a chance of selling the picture to, including the Paradise.

Q. All right. Now, I would like to have you take the picture Glass Menagerie.

A. At the Southside we earned \$908.12 or 42 cents. I can't tell from this.

Q. Will you give the amount again?

A. \$908.12.

Q. On a 7-day availability? A. Yes, sir.

Q. Did you play it in another theatre on the 7 day availability?

(Testimony of Fred Greenberg.)

A. At the United Artists we got \$1000. That was on a 14 day availability. I am sorry.

Q. I think you will find you played it on a 7 day availability also in the Academy?

A. Yes. We earned \$1184.70.

Q. All right. Now, I think you will find, if you check, that the Paradise played a 14 day availability on that picture.

A. You said 14 days? [2673]

Q. Yes.

A. And we earned \$200 from the Paradise.

Q. And I think if you will check the Centinela Drive-In you got a 21 day play there?

A. \$150.

Q. What is that amount again? A. \$150.

Q. And subject to *correct*, Mr. Corinblit, on that, I would like a stipulation that the national gross was \$946,000 and the Los Angeles gross was \$65,000.

Mr. Corinblit: So stipulated.

Mr. Mitchell: Are my figures correct?

Mr. Westbrook: They are correct, yes.

Q. (By Mr. Mitchell): All right. Now, Mr. Greenberg, calling attention to the fact that the Glass Menagerie with a national gross of \$946,000 as compared with the national gross on The Enforcer of \$1,449,000, playing two theatres on the 7 day availability day and date, and getting an additional play-off grossed \$3,442 and that on The Enforcer with a higher national gross playing four theatres on the 7 day availability and getting only

(Testimony of Fred Greenberg.)

two theatres on the 21 day, you got \$3,500 gross. What does that indicate to you about playing four theatres on a 7 day availability versus playing two theatres on a 7 day availability? [2674]

Mr. Corinblit: Object to that as being argumentative and calling for a conclusion of the witness. No connection has been shown between these two items he is asking about. [2675]

Mr. Mitchell: That is what I wanted the witness to do, to show the connection.

The Witness: Pardon me, Mr. Mitchell. Would you mind repeating that question?

(Question read by the reporter.)

The Witness: I would consider it to be much to the advantage of everyone concerned to be playing a limited number of theatres. Saturated booking, maintaining additional overheads on that play-off I believe works to everybody's disadvantage, including our own. The theatres themselves don't gross enough to make a substantial profit and obviously we are not benefiting.

Q. (By Mr. Mitchell): What does what you call a saturation booking on 7 day, such as these four 7 day theatres, do to your ability to play 14 and 21 day availability in the area?

A. It diminishes very much our chance of getting additional play-off, not only on 14 and 21, but even in houses that play later.

Q. Now, we have here a picture Goodbye My Fancy, which you played on three 7 day availabilities in the area, that picture having a national

(Testimony of Fred Greenberg.)

gross somewhere near The Enforcer, a little less, and your figures show that the play-off in the Inglewood area on this basis netted you \$1,941 against The Glass Menagerie play-off here of a picture which grossed [2676] \$946,000, and I should say that is somewhere near the Goodbye My Fancy gross, and paid total film rental of 3,432, nearly a third more.

What does that indicate to you about the advisability of playing three day and dates versus playing two day and dates on a 7 day availability?

A. I would still hold to my thinking that two works to the advantage of everyone.

Q. After your memorandum of May 17, 1951, which has been admitted in evidence as Defendant Warner's Exhibit G-6, when you instructed the bookers and salesmen to discontinue bidding in the Inglewood area on the 7 day run, how did you license your seven day run thenceforward?

A. Through negotiation.

Q. I mean through September 1951.

A. There was negotiation.

Q. And in such negotiation from that time on what opportunity did you give the Paradise?

A. Equal opportunity?

Q. What did you do? What did your salesmen do under your direction?

A. The salesmen under my direction—as a matter of fact, in that particular case if Mr. Paradise sought the picture, he would have to compete for it with other theatres that had, it was indicated

(Testimony of Fred Greenberg.)

very clearly by one of the competing [2677] theatres that they felt they had—in this case it happened to be the La Tijera, and he insisted upon it, if he had to compete for pictures, he insisted on bidding against this one house.

Q. Did you have formal competitive bidding from that time on?

A. Formal bidding was offered the Paradise under such circumstances, pictures were offered them to negotiate under such circumstances, but only on an equal opportunity basis with the La Tijera, the one most involved.

Q. You also offered La Tijera an opportunity to negotiate? A. That's right.

Q. And what if the La Tijera offered the most, what kind of clearance would you give him?

A. What was demanded under the terms of whatever our negotiation called for. That was considered a part of the deal.

Mr. Mitchell: I would like to just check here a moment.

Q. In licensing your pictures in the Inglewood area on these various runs, 7, 14, 21, during the period of August 1950 to September 17, 1951, when the Paradise was open, did you have any arrangement, understanding, conspiracy, combination, or other form of agreement with Paramount or [2678] Loew's or Universal in respect of these varying methods that you adopted in licensing pictures on those subsequent runs?

A. None whatever.

(Testimony of Fred Greenberg.)

Q. And in respect of the Fox company and Fox West Coast, other than your film licensing agreements, did you have any such arrangement, understanding or combination or conspiracy with the Fox companies? A. No, sir.

Mr. Mitchell: That's all. [2679]

Cross Examination

Q. (By Mr. Corinblit): Mr. Greenberg, just a few minutes ago Mr. Mitchell asked you what conclusions you drew from these figures on here about being to the best interest of your company not to sell three runs but only sell two runs, is that right, and you testified—do you testify here before this jury that your company has established that policy, that on your pictures it is to your best interest in the Inglewood area to sell two 7 day runs and not three?

The Court: You are talking about 1950 and 1951?

Mr. Corinblit: Let us talk first about 1950 and 1951.

The Witness: Let me have that question again.

Mr. Corinblit: Will you read the question?

The Court: Read the question, Mr. Reporter.

(Question read.)

The Witness: I feel it to the best interest of the company to diminish the runs.

Q. (By Mr. Corinblit): I am sorry.

A. I feel it is to the best interest of the company to diminish the runs—under the circumstances

(Testimony of Fred Greenberg.)

to diminish the runs and also to maintain a less number of overheads.

Q. Well, we will get to the overheads in a minute.

When you say "a less number of runs," you mean two instead of three? [2680]

A. (No answer.)

Q. That was the question Mr. Mitchell asked you.

A. That is a rather difficult question to answer directly.

Q. In other words, you are not willing to state that it was to the best interest of your company to have two runs instead of three in 1950 and 1951, are you?

A. I feel that it is best, yes, but then for me to reach back to 1950 and '51 with changing circumstances, I am not prepared to make a direct answer.

Q. Well, I want to make this perfectly clear. You didn't have that feeling in 1950 and '51 and you don't have the feeling now that it is to the best interest of your company to have two instead of three runs? A. (No answer.)

Q. Or is your answer you don't know?

A. I think it could be put in that category.

Q. That is, you just don't know?

A. Well, I don't want to say that I don't know.

In practical operation of distributing motion pictures in a general area I feel that it is better not to difuse the possibilities of a motion picture.

(Testimony of Fred Greenberg.)

Mr. Corinblit: I move to strike that answer, your Honor, as being non-responsive.

My question is specific and that is whether or [2681] not in 1950 and '51 it was Warner's position that it was to their best interest to have two runs instead of three.

The Court: Well, does this witness have the right to establish the position of Warner Bros. as a whole? He can give his own opinion.

Mr. Corinblit: I will take his own opinion.

The Court: This witness may have nothing to do with the establishing of policy.

Mr. Corinblit: Mr. Mitchell didn't put Mr. Greenberg on the stand in order to get his personal private opinion. I take it he put Mr. Greenberg on the stand to establish what was Warner's opinion or Warner's policy.

Mr. Mitchell: Unfortunately I don't have Mr. Herbel here, who was the real boss, so I put on the next best man.

The Court: I don't know whether a district office has a right to establish policy in a district, or does he?

The Witness: Mr. Herbel did establish this policy. Mr. Herbel did the negotiations as you are aware.

Mr. Corinblit: Yes.

The Court: Mr. Herbel established this policy, did he?

The Witness: I mean Mr. Herbel handled that particular area during that period.

(Testimony of Fred Greenberg.)

The Court: Was Mr. Herbel the one who established the policy in that district or did he consult somebody higher up?

The Witness: He established that policy in that district. [2682]

The Court: He established the policy in that district?

The Witness: Yes.

The Court: Did you have anything to do with establishing that policy?

The Witness: No, I did not.

Q. (By Mr. Corinblit): I want to turn to your opinion that Mr. Mitchell asked you about. Was it your opinion in 1950 and 1951 that it was better to have two runs instead of three in the Inglewood-Westchester area on a 7 day availability?

A. I just don't know.

Q. You don't know the answer to that question?

A. (No answer.)

Q. And therefore when Mr. Mitchell asked you what conclusion you drew from these figures as to whether it was better to have two runs instead of three, your answer is you don't know, isn't that right?

A. On that particular question, yes.

Q. Well, your answer really isn't you don't know, Mr. Greenberg. Your answer is really that you do know it is better to have three runs than two and the reason you know that is because your company has been doing that — has been having

(Testimony of Fred Greenberg.)

three runs on your best pictures in that area, isn't that right? A. Quite often. [2683]

Mr. Mitchell: That question is in another time and under different conditions. It is very hard to try a lawsuit as of 1950 in 1956 when things are so different.

We have been doing it, and I think that jumping from 1950 to 1956 with this witness in this manner is both confusing and misleading and that is the purpose of it, your Honor.

The Court: State the question as to 1950-51 and if you want to show there has been a change, you may do so and ask the witness the reason why.

Q. (By Mr. Corinblit): Mr. Greenberg, it is a fact on the picture Mister Roberts you had three runs on the 7 day availability in the Inglewood-Westchester area?

A. I would have to look that up.

Mr. Mitchell: That is a way beyond 1950 and '51. As I recall, Mister Roberts is a current picture.

Mr. Corinblit: Yes. That is correct, Mr. Mitchell. But the court ruled I could show the change of position.

Mr. Mitchell: Let us get the dates.

Mr. Corinblit: September 14, 1955 and I will give you the theatres.

Q. As a matter of fact, you played the picture Mister Roberts day and date at the Paradise, at the Academy and at the Southside beginning September 14, 1955. That is correct, isn't it? [2684]

A. I assume that it is correct.

(Testimony of Fred Greenberg.)

Q. And Mister Roberts was probably—was that one of your best pictures that year?

A. It was a big grosser.

Q. It was a big grosser and so your company took the position that this big grosser—that it was good Warner policy to have three runs in the Inglewood-Westchester area on a 7 day availability?

A. It is easier to do it with a big grosser, you know.

Q. In other words, on the better pictures it is good policy? A. Sometimes.

Q. All right. Now, let us turn—was the picture—I wasn't sure of this—I am not sure whether The Court Martial of Billy Mitchell was a Warner picture. A. Yes, it was.

Q. That was a big grosser?

A. Very large, but not as large as Mister Roberts.

Q. And on September 11, 1956, you played three runs day and date on the picture The Court Martial of Billy Mitchell at the Paradise, the Academy and the Southside, isn't that right?

Mr. Mitchell: September 1956?

Mr. Corinblit: September 11, 1956. [2685]

Mr. Mitchell: How can you mean that?

Mr. Westbrook: It hasn't occurred yet.

Mr. Corinblit: I beg your pardon. I am sorry. I meant January 11, 1956.

The Witness: I am in an utter state of confusion anyhow, but go right ahead.

(Testimony of Fred Greenberg.)

Q. (By Mr. Corinblit): I am sorry.

The Court: Maybe you had better rephrase your question. You have us all confused.

Q. (By Mr. Corinblit): The question is with respect to the big grosser The Court Martial of Billy Mitchell. It began playing January 11, 1956, and you played that picture simultaneously in three theatres on a 7 day availability and those theatres were the Paradise, Academy and the Southside, isn't that right?

A. That is right. May I point out something, Mr. Corinblit?

Q. Believe me, Mr. Greenberg, I am going into the justification for these matters in just a few moments.

How about the picture Young at Heart? Was that a big grosser?

A. Not in comparison with the other two pictures.

Q. That was on the small grossing side and on that picture, a small grosser, you played that picture beginning January 12, 1955, day and date at the Paradise, Academy and [2686] the Southside, isn't that correct?

A. I assume that it is.

Q. Now, the picture Her Majesty or His Majesty O'Keefe, was that a big grosser or a little grosser or medium? A. Medium.

Q. That was a medium grosser. Now, on that picture—yes, you played that picture day and date at one, two, three, four, five theatres in the Ingle-

(Testimony of Fred Greenberg.)

wood-Westchester area beginning on February 17, 1954 at the Paradise, the Southside Theatre, the Fifth Avenue Theatre, the Studio Drive-In and the Vermont Drive-In, isn't that correct?

A. I assume that it is.

Mr. Mitchell: Those are two theatres outside the area, your Honor. It was three in the area, and two outside the area.

Q. (By Mr. Corinblit): How about the picture Track of the Cat? Was that a big grosser or just a medium grosser? A. Medium.

Q. Medium grosser, all right.

A. Are you involving the other drive-in theatres that are in Gardena in this general Inglewood area?

Q. No. The only reason I listed them is—I don't have any quarrel about the drive-in theatre—the Vermont Drive-In which is a long way from the Westchester area and the Studio.

A. You named five. [2687]

Q. (By Mr. Corinblit): They just happened to be on my list, Mr. Greenberg.

A. So you read them off.

Q. Yes. Now, I want to talk about a picture, Track of the Cat, beginning September 8, 1954. The fact is you played that picture, which you describe as a medium grosser, on the 7 day availability day and date at three theatres again, the Paradise, Academy and Southside, isn't that correct?

A. I assume that it is. Let me ask you a question on that inasmuch as you are——

(Testimony of Fred Greenberg.)

The Court: I am awfully sorry, but you can't ask questions.

The Witness: I'm sorry.

The Court: Your only prerogative is to answer them.

The Witness: I'm sorry.

Q. (By Mr. Corinblit): Mr. Greenberg, in the light of these facts, I want to take you back to the period of 1950 and 1951. The fact is, is it not, it would have been perfectly good business in 1950 and 1951 to play either the big grossers, as the pictures we have named, or the medium grossers, which include some pictures we have named, or the small grossers, which I think we have got one of in that class, on three day and date instead of two day and date, isn't that correct?

A. I don't necessarily agree with you, [2688] Mr. Corinblit. In 1950 and 1951, the facts were different than your 1955 and 1956 situation because of the vast increase of population in that area.

I still contend, as I did at the outset, that when you play four theatres and break up that first dollar, that actually no one benefits. The theatres themselves do not develop enough gross to carry those overheads, and we don't benefit, as you can see from the total gross there. Now, what has happened in 1955 and 1956 with reference to Roberts and some of the other top pictures, these populations, especially in the Southside, as you very well know, are so tremendously increased in the past five years that there is a big difference.

(Testimony of Fred Greenberg.)

Q. Do you have the population figures on those increases, Mr. Greenberg?

A. Do I have them?

Q. Yes. A. I roughly know them.

Q. What is the difference in population in the Southside area in 1950 as compared with 1955?

A. I know only that it is——

Q. Can you answer that question?

A. I am not prepared to answer that sort of a question. That is not my field.

Q. Do you know the difference in population [2689] in the area of the Academy in 1950 and 1955?

A. No. I know it has increased tremendously in that particular area you asked me about.

Q. You know of your own knowledge in the area of the Academy between 1950 and 1955 the population has increased, you know that?

A. I said of the Southside.

Q. How about the Academy area?

Mr. Mitchell: Well, there isn't any Academy area. When he speaks about the Academy area, that is an indefinite question.

The Witness: That's Inglewood.

Mr. Mitchell: There isn't any such thing as an Academy area.

Mr. Corinblit: The witness has testified the reason for the difference is the increase in population, and I would like to know what he is talking about.

The Witness: I refer to the Southside, which is a fact.

(Testimony of Fred Greenberg.)

Q. (By Mr. Corinblit): I beg your pardon?

A. I referred to the tremendous increase in population around the Southside Theatre area.

Q. Now, Mr. Greenberg, in 1950 and 1951 you were playing at the Southside, weren't you?

A. I think so. [2690]

Q. And in 1955 you were playing in the Southside. A. Yes.

Q. Then that increase in population has nothing to do with the increase in the number of runs, does it?

A. Not in that particular case.

Q. All right. Is it your testimony that the number of people in the Paradise area in 1950, which has been testified to here now, yesterday, in the neighborhood of, I think, about 40,000 people, was not enough to permit your company to play a 7 day availability in that theatre day and date with the Southside and Academy, 1950 and 1951?

A. It could very well have done it, had it not been that there was another theatre in the immediate area that demanded equal opportunity, the same opportunity that was offered the Paradise, on every occasion I had to discuss that particular situation with the owner.

Q. We will get to those discussions, but the first part of your answer was it could have been, that is to say, from the population point of view, there were enough people to support a 7 day run on your pictures in the Paradise area in 1950 and 1951 day and date with the Academy and South-

(Testimony of Fred Greenberg.)

side, there were enough people? 40,000 people is enough people, 40,000 within an area of two miles, that is correct, is it not? A. Yes. [2691]

Mr. Corinblit: Your Honor, I think this is a good breaking point.

The Court: Ladies and gentlemen of the jury, we are about to take another recess. Again it is my duty to admonish you you are not to discuss this case with anyone, you are not to allow anyone to discuss it with you, and you are not to formulate or express any opinion as to the rights of the parties until this case has been finally submitted to you.

With that admonition we will now recess until 2:00 o'clock this afternoon.

(A recess was taken to 2:00 o'clock p.m.)

Thursday, August 9, 1956. 2:00 P.M.

The Court: Do you stipulate the jury are present and in the jury box?

Mr. Corinblit: So stipulated, your Honor.

Mr. Mitchell: Yes.

The Court: You may proceed.

FRED GREENBERG

having been heretofore sworn, resumed the stand and testified further as follows:

Cross Examination—(Continued)

Q. (By Mr. Corinblit): Mr. Greenberg, I have put on the board here a summary or, rather, in response to your answers that you gave to Mr.

(Testimony of Fred Greenberg.)

Mitchell's questions about the particular pictures involved—that is to say I have listed here under the name—under the word “Picture” the name of the picture that Mr. Mitchell asked you about. And opposite under “Number of picture,” I have taken the release number off Warner's cut-off cards and put that opposite.

And then I have got the theatres listed—Paradise, United Artists, all Fox—that was my entry, La Tijera and Southside, and then the answers “Yes” or “No” which indicate [2693] your answers as to whether or not bids were returned.

This summarizes whether bids were returned on the pictures indicated and this is a statement, a composite of your answers and I believe it is correct. I took it down as you were testifying under Mr. Mitchell's direction. We can check it out from the forms that you have in front of you.

Mr. Mitchell: I think you should not use the term “all Fox” because his answers didn't indicate that all of the Fox theatres bid.

Mr. Corinblit: You are right on that.

Mr. Mitchell: And subject to that criticism we make no question about it, but subject to a check if there is some error.

Mr. Corinblit: Certainly. Shall we just call this “Academy”?

Mr. Mitchell: I think it was always the Academy on these pictures, as I recall it.

Mr. Corinblit: There was one group concerning Dodge City and Virginia City—017 and 018.

(Testimony of Fred Greenberg.)

Mr. Westbrook: There are a number of deviations on the Breaking Point. One bid was submitted on behalf of Fox and one on behalf of the Fifth Avenue.

Mr. Corinblit: Fox and Fifth Avenue?

Mr. Westbrook: Yes.

Mr. Corinblit: I will put down the letter "F" and "Fifth Avenue." [2694]

Mr. Westbrook: And Raton Pass at the Fox-Inglewood.

Mr. Corinblit: All right.

Mr. Westbrook: I think your comment about Dodge City and Virginia City—I think the information you have is correct.

Mr. Corinblit: No bids returned.

Mr. Westbrook: Nobody submitted any bid.

Mr. Corinblit: Then with those exceptions, the understanding will be that the reference "all Fox" really refers to the Academy, is that right, Mr. Mitchell?

Mr. Mitchell: That is right.

Q. (By Mr. Corinblit): All right. Now, Mr. Greenberg, I don't know whether you can answer this question, but I would like a stipulation on this as we go along.

You did not put into evidence, your counsel did not put into evidence who got the pictures—that is, you testified that bids were sent out and you also testified to the fact that these people returned or didn't return bids, but there was no mention made of who got the pictures on the 7 day availability.

(Testimony of Fred Greenberg.)

We have checked that out from the cut-off cards and I would like a stipulation on that point.

On the picture *Breaking Point*, that is the first one——

Mr. Westbrook: Fox-Inglewood got the bid.

Mr. Corinblit: I will draw a circle around the [2695] theatre that won the picture—006.

Mr. Mitchell: Let us use the names. I can't deal with the numbers.

Mr. Corinblit: *Three Secrets*. My record shows that the Academy and the Southside got the picture.

Mr. Mitchell: Correct.

Mr. Corinblit: *Rocky Mountain*, the Academy and the Southside got that picture.

Mr. Mitchell: Correct. [2696]

Mr. Corinblit: On *Glass Menagerie*, the Academy and the Southside got the picture?

Mr. Mitchell: Correct.

Mr. Corinblit: On *Breakthrough*, the Academy and the Southside got the picture?

Mr. Mitchell: Correct.

Mr. Corinblit: On *West Point Story*——

Q. (By Mr. Corinblit): Would you check *West Point Story* to see whether Southside put in a bid on that, Mr. Greenberg?

Mr. Mitchell: No, they did not.

Mr. Corinblit: No bid put in?

Mr. Mitchell: No.

Mr. Corinblit: All right. On that the Academy and the Southside got the picture.

(Testimony of Fred Greenberg.)

Mr. Mitchell: That's right.

Mr. Corinblit: On the picture Highway 301, the Academy and the Southside got the picture?

Mr. Mitchell: That's right.

Mr. Corinblit: On the picture Dallas, the La Tijera got the picture.

Mr. Mitchell: No. I think that is wrong.

Mr. Corinblit: All right.

Mr. Mitchell: I think the United Artists got it.

Mr. Corinblit: Dallas?

Mr. Mitchell: Yes. [2697]

Mr. Corinblit: We will pass that and come back to it in a minute. We will check the cut-off card.

On the picture Operation Pacific, La Tijera and Southside got the picture.

Mr. Mitchell: My information is the United Artists and Southside got it.

Mr. Corinblit: We will check that, both Dallas and Operation Pacific.

On the picture Storm Warning, the Academy and Southside.

Mr. Mitchell: That's right.

Mr. Corinblit: On the picture Enforcer, the United Artists, Imperial, La Tijera and Southside.

Mr. Mitchell: That's right.

Mr. Corinblit: On the picture Raton Pass, the United Artists and Southside.

Mr. Mitchell: No. I have United Artists playing that exclusively.

Mr. Corinblit: Alone? We will pass that and come back to it.

(Testimony of Fred Greenberg.)

On the Dodge City-Virginia City, double bill, did the Fifth Avenue win the picture?

Mr. Mitchell: That's right, exclusively.

Mr. Corinblit: All right. On Lullaby of Broadway, the La Tijera and the Southside. [2698]

Mr. Mitchell: That's right.

Mr. Corinblit: On Sugar Foot, the La Tijera and Southside.

Mr. Mitchell: No. It is La Tijera and Fifth Avenue.

Mr. Corinblit: And Fifth Avenue?

Mr. Mitchell: That's right.

Mr. Corinblit: We will check that.

Q. Now, on the picture Only the Valiant, Mr. Greenberg — before I ask those questions, Mr. Greenberg, will you take a look at Only the Valiant, your records, and see if it isn't true that — well, withdraw that.

It is a fact, is it not, that you did not send to the Southside any request to bid on the picture Only the Valiant?

A. That's right. I see no record of it.

Mr. Corinblit: So this wasn't sent. But on the award the La Tijera and the Southside got the picture.

Mr. Mitchell: No. The picture Only the Valiant was negotiated to the Southside alone.

Mr. Corinblit: Just the Southside?

Mr. Mitchell: Yes.

Mr. Corinblit: We will mark that down and check it.

(Testimony of Fred Greenberg.)

Q. The same thing is true for the next picture, Communist For the FBI, there was nothing sent to the Southside, [2699] was there?

A. I will look——

Mr. Mitchell: I recall his so testifying.

Mr. Corinblit: All right, not sent.

Q. You didn't send anything to the La Tijera either on that one, did you, is that right, no bid sent to the La Tijera?

A. I started to look it up and someone stopped me.

Q. The picture Communist For the FBI. It is near the end of your group? A. What group?

Mr. Mitchell: That may be one of those that is missing.

The Witness: I don't find it at all, Mr. Corinblit, not in this group.

Mr. Mitchell: In any event, there were no bids sent on that at all.

Q. (By Mr. Corinblit): But on the question of whether they were sent, you have no records of bids being sent? A. I know nothing about it.

Q. All right. A. I have no record here.

Mr. Corinblit: Why don't we put this down, then, as no record.

Mr. Mitchell: Yes. In line with what was being [2700] done on all the other pictures, I think that is just a missing record.

Mr. Corinblit: I don't know about this time what was happening either, but I will put down "no record."

(Testimony of Fred Greenberg.)

Q. With respect to the Imperial, you have no records either? A. On that picture?

Q. On that picture, yes.

A. I have no records of any sort.

Q. Well, you have records on the Paradise, United Artists and Fox, is that right?

A. What picture are you talking about?

Q. Communist For the FBI.

A. I couldn't find that. Oh, yes, I have that.

Q. There are only three theatres, Paradise, United Artists and Fox, is that right?

A. The United Artists, the Academy, La Tijera, Imperial and Paradise.

Q. Mr. Greenberg, I mean do you have bid forms there. A. Returned?

Q. No. Bid forms that indicated you sent out bids to the La Tijera on the picture Communist For the FBI. A. No.

Q. You don't have any forms?

A. No. [2701]

Q. You don't have information on the Imperial, either, do you, that is, you have no bid forms showing you sent it to the Imperial Theatre?

A. No, I don't have copies of the bid.

Q. No record on the Imperial. You do have a record you sent a bid form to the Paradise, United Artists and Academy, right?

A. Yes, Academy, United Artists and the Paradise.

Q. All right. Now, on the picture Goodbye My

(Testimony of Fred Greenberg.)

Fancy, you did not send a bid form to the Southside? A. I don't think so.

Mr. Corinblit: The theatres that got the picture were the La Tijera and Southside, on Goodbye My Fancy. Is that stipulated to, Mr. Mitchell?

Mr. Mitchell: And United Artists. That was a three-theatre play-off.

Mr. Corinblit: All right. La Tijera and United Artists.

Q. On the picture Along the Great Divide, will you take a look at that, Mr. Greenberg? Do you have any information that a bid form was sent to the Southside on that picture?

A. Not indicated on this form.

Mr. Corinblit: All right. The theatres that got the picture are the Southside and the La Tijera, is that right, [2702] Mr. Mitchell?

Mr. Mitchell: That's right.

Mr. Corinblit: All right.

Mr. Mitchell: There is one other thing, in order to complete this picture that you are bringing in here, as long as I have stipulated to these other facts rather than having you produce them, I want you to stipulate with me, if you will look at your Exhibit 45-J, that the following pictures during the time of Marco's operation played the 14 day availability at the Paradise following the play in the Southside, to-wit, Three Secrets——

Mr. Corinblit: Mr. Mitchell——

Mr. Mitchell: Just a minute.

Mr. Corinblit: All right, go ahead.

(Testimony of Fred Greenberg.)

Mr. Mitchell: Three Secrets, Rocky Mountain, Glass Menagerie, Breakthrough, and the West Point Story. [2703]

Mr. Corinblit: That they played on 14 day availability in the Paradise.

Mr. Mitchell: Yes, following this play you have on the board.

Mr. Corinblit: Subject to correction I will so stipulate.

Mr. Mitchell: Thank you.

Mr. Corinblit: Now, can we go back for a minute to the pictures that we have had some question about, and that is Dallas and Operation Pacific.

For Dallas my records show that the La Tijera got the picture.

Mr. Herscher: United Artists.

Mr. Corinblit: Your record shows United Artists and that is correct.

With reference to Operation Pacific, the question is did the La Tijera and the Southside get the picture or did somebody else?

Mr. Herscher: Southside and United Artists.

Mr. Mitchell: That is right.

Mr. Corinblit: Then we have a question on Raton Pass. What theatre got that?

Mr. Herscher: Southside and United Artists.

Mr. Corinblit: Is that correct?

Mr. Mitchell: Just a minute. That doesn't agree with the record I have. Just a minute until we make another check. [2704]

(Testimony of Fred Greenberg.)

Mr. Corinblit: All right. We agree on the Southside.

Mr. Mitchell: No, we don't. I say that does not agree with the record that I have. Let me check it.

Mr. Corinblit: You don't agree with the Southside?

Mr. Mitchell: Hold the boat.

Mr. Westbrook: What is the play date on Raton Pass?

Mr. Corinblit: I can check that for you.

Mr. Mitchell: That is correct.

Mr. Corinblit: Our record is correct?

Mr. Mitchell: Yes.

Mr. Corinblit: All right. So that is the Southside and the United Artists?

Mr. Mitchell: That is right.

Mr. Corinblit: Now, we have two others, the picture Sugarfoot. Our record shows the La Tijera and the Southside.

Mr. Mitchell: Let me check that again.

Mr. Herscher: Southside is correct.

Mr. Mitchell: That is correct.

Mr. Corinblit: All right. The La Tijera and the Southside and finally on the picture Only the Valiant, my record shows that the Southside got it and the La Tijera. I thought you said you thought the Southside got the exclusive.

Mr. Mitchell: Let us check that with another record we have here.

Mr. Corinblit: All right. [2705]

(Testimony of Fred Greenberg.)

Mr. Mitchell: You are correct, the Southside and the La Tijera.

Mr. Corinblit: Right. Now, let the record show that I have circled on this exhibit the theatres that received the pictures on 7 day availability.

Q. Now, after the picture beginning with the picture *Only the Valiant*, the next four pictures, it is shown that you didn't send any bids to the Southside Theatre at all. That is, you didn't send any bid requests. That is a fact, is it not, Mr. Greenberg, a fact confirmed by the fact that in your bid forms you don't indicate for any clearance affecting the Southside? A. That is right.

Q. Now, you will notice, Mr. Greenberg, on this schedule it is shown that, beginning with the picture *Three Secrets*—well, on the picture *Three Secrets* the Southside did not submit any bid but it was awarded the picture day and date with the Academy. That is correct, isn't it?

A. The picture was negotiated with them, yes.

Q. Now, that same thing is true with respect to every picture that the Southside won—that is to say, they didn't submit a bid on a single picture beginning with *Breaking Point* and ending with *Along the Great Divide* and that runs from about September to May, September '50 to May of 1951. No bids were submitted by the Southside, but in every case when they [2706] won the picture and they won——

The Court: Won?

(Testimony of Fred Greenberg.)

Mr. Mitchell: They didn't win the picture. They negotiated for it.

The Court: "Won" is the wrong word.

Q. (By Mr. Corinblit): They got to play the picture 7 day availability day and date with the other theatre or theatres, but they did not submit bids. That is correct, isn't it?

Mr. Mitchell: They were just offering one picture on bids, your Honor, and they were negotiating on the second one.

The Court: On the same availability?

Mr. Mitchell: Yes, that is right.

Q. (By Mr. Corinblit): Now, Mr. Greenberg, let us take a look at these requests. I will start with the first one. Here is Rocky Mountain. I will show you Defendants' Exhibit—Warner's Exhibit H-6 in evidence, I believe it is in evidence—yes, and see if this is correct.

You sent out a bid form on that picture to all of the theatres in the Inglewood-Westchester area including the Paradise, La Tijera, Fox West Coast for its theatres and the Southside, is that right?

A. Right.

Q. You sent the bids out and in the place marked [2707] "clearance" you said that the maximum clearance to be granted shall be 7 days following Los Angeles first run closing clear of United Artists, Inglewood, La Tijera, Imperial, Southside and Paradise. Right? A. Right.

Q. And then you made a contract with the Academy? A. Right.

(Testimony of Fred Greenberg.)

Q. And this is the contract, Exhibit H-6?

A. That is what it amounts to.

Q. So in this contract the Academy Theatre had clearance over all the theatres listed, correct?

A. Right.

Q. Now, then, in other words, when the Academy won that bid, they had the right under this contract, to the exclusive run over all of the theatres listed there, isn't that right?

A. That is right.

Q. Now, what they did later on then was to waive their right in order to permit the Southside to play day and date, is that right?

A. Well, I don't know whether you would call it waiving or not, but at least we negotiated with the Southside for an additional run.

The Court: May I ask you a question? At that time did you consider the Southside Theatre in competition? [2708]

The Witness: Certainly not strongly in competition with downtown Inglewood.

The Court: As you understand the term, is it your opinion that during this period of time the Southside Theatre was in substantial competition with downtown Inglewood?

The Witness: Well, they were in competition as every theatre in that area is in competition one with another, but certainly not to the degree that other theatres closer to them were.

The Court: Now, will you explain to the jury

(Testimony of Fred Greenberg.)

what you understand by the term "substantial competition"?

The Witness: A lot.

The Court: Explain your definition of substantial competition.

The Witness: Where it would affect them adversely to the extent that they might show a lesser profit or *nor* profit at all.

The Court: Is that your understanding of the meaning of "substantial competition"?

The Witness: Well, it would certainly affect them adversely at the box office if it was in substantial competition to the extent—I couldn't determine that without checking the grosses during that time.

The Court: I am not talking about grosses. I am talking about the general situation. [2709]

Does substantial competition in your mind depend entirely upon box office receipts?

The Witness: That is right.

The Court: All right. How much in percentage do you have to have in order to establish substantial competition? One per cent or 50 per cent?

The Witness: Well, depending upon the margin that is left for profit. Might be 10 or 15 per cent. That would be a guess. I wouldn't know.

The Court: You don't know what the basis is that you use for determining whether two theatres are in substantial competition except that it must affect the box office?

The Witness: That is right.

(Testimony of Fred Greenberg.)

The Court: But you don't know how much?

The Witness: No, because there would be varying degrees of it, depending upon what a house would be grossing and how it would be affected after another house opened against it day and date.

The Court: But it is your opinion now at this particular time that the Southside Theatre was in substantial competition with the theatres in downtown Inglewood?

The Witness: I never considered them seriously in competition with downtown Inglewood, being out in a tremendous area by itself, sir, and east of town.

The Court: Do you want to say now they were not in substantial competition?

The Witness: Not in serious substantial competition. I say they were in competition with each other.

The Court: All right.

The Witness: But to what degree is pretty hard for me to determine.

The Court: I might say for your benefit that no two witnesses have testified the same about this term substantial competition.

The Witness: It is elusive.

Q. (By Mr. Corinblit): Now, Mr. Greenberg, let's not talk about downtown Inglewood now, because you don't consider the Academy in downtown Inglewood, do you?

A. Well, I consider it serving Inglewood.

Q. All right. Was it your opinion that the

(Testimony of Fred Greenberg.)

Academy and the Southside were in substantial competition in 1950 and 1951?

A. I think the Southside might have siphoned off some of the business from the Academy. To what extent, I don't know.

The Court: That is not an answer. It is no disgrace to say you don't know, but if you try to answer, you have to answer yes or no.

The Witness: Let me save myself from disgrace then and I will say I don't know. [2711]

Q. (By Mr. Corinblit): How about the Paradise and the Southside, were they in substantial competition in 1950 and 1951?

A. I don't know.

Q. You don't know?

A. I will save myself the disgrace.

Q. Yesterday there was——

A. I would say no.

Q. You say no?

A. I would say yes, probably they were in competition, because I think they were closer to each other than the area serviced by the Academy.

Mr. Corinblit: Now, counsel, it is stipulated, is it not, that the Paradise was further from the Southside than the Academy was from the Southside?

Mr. Mitchell: I don't remember what the figures are, but they are in the record, whatever they are.

Mr. Corinblit: The figures of 3½ miles and 4½ miles, isn't that right, Mr. Westbrook?

Mr. Westbrook: Counsel, you are confused. You

(Testimony of Fred Greenberg.)

asked the witness about the Paradise and Southside, and now you are talking about the Academy and Southside. I don't know, frankly, what you are talking about.

The Court: Isn't it true that the stipulation as to distance that you have entered into shows that the Paradise [2712] Theatre is further from the Southside than the Academy?

Mr. Westbrook: I think without any question that is true, your Honor, but that isn't what Mr. Corinblit asked Mr. Greenberg about.

Mr. Corinblit: Your next question is this, your Honor. It is stipulated, and I think I have the figures here, that the distance from the Paradise to the Academy is approximately $3\frac{1}{2}$ miles. Is that right, counsel?

Mr. Westbrook: Paradise to the Academy is approximately $4\frac{1}{2}$ miles, isn't that right?

Mr. Corinblit: $4\frac{1}{2}$ miles. You are right. All right. The distance from the Academy to the Southside is approximately $3\frac{1}{2}$ miles.

Mr. Westbrook: I think the figure is 3.6. I think if you clock it, you will find it is further, but I stipulated to 3.6 so we could have some agreement about mileages in this case.

Q. (By Mr. Corinblit): Mr. Greenberg, you have heard the stipulation that the Academy to the Southside is approximately 3.6 miles, the Academy to the Paradise is approximately 4.5 miles, so that the Paradise is further from the Academy than the Southside from the Academy. Now, is it your testi-

(Testimony of Fred Greenberg.)

mony that the Paradise and the Academy were in substantial competition? A. I don't know.

Q. What is your testimony as to whether the Academy and the Southside, 3.6 miles apart, were in substantial competition?

A. I think I answered that. I don't know.

Q. All right. Now, yesterday, your counsel, counsel for defendants, put on a witness who drew these circles, drew some circles for the jury. This is between the Southside and the Paradise. Let me ask you this question before we go any further. In your opinion were the Paradise and the Southside in substantial competition in 1950 and 1951? The testimony by Mr.—

Mr. Mitchell: Let's not argue. You have asked a question and, your Honor, then he goes on and argues and argues.

Mr. Corinblit: All right.

The Court: You shouldn't argue, and I don't think you should tell him what other witnesses have testified to. He is entitled to his opinion, and if he says he doesn't know, that ends the situation.

Q. (By Mr. Corinblit): I want to get the answer to this question now. Were the Paradise and Southside in substantial competition in 1950 and 1951?

A. I think I answered that I don't know.

Q. All right. With respect to this group of pictures listed on the schedule, when you had sold the first run to the [2714] theatre indicated, for example, the Academy, and the Academy had the right

(Testimony of Fred Greenberg.)

to exclude every theatre from playing day and date, and then you sold the picture to the South-side, did you have any discussions with the people at Fox West Coast in order to get them to waive the clearance?

A. No, sir, because I did not negotiate with Fox West Coast. Those dealings, as I told you, were done by Mr. Herbel.

Q. Mr. Herbel? A. Yes, sir.

Q. You had no knowledge as to any discussions that were had with Fox West Coast about releasing clearance?

Mr. Mitchell: That assumes, your Honor, that Warner had a discussion with Fox West Coast, and I object to it on that ground.

The Court: Sustained.

Mr. Corinblit: Your Honor, there had to be some kind of talk. They had the right under the contract to clearance.

Mr. Mitchell: Maybe Warners just went over their dead bodies and did what they chose to do. There doesn't have to be anything.

Q. (By Mr. Corinblit): Do you have any knowledge, Mr. Greenberg, one way or the other, as to whether anybody talked to Fox? [2715]

A. I would assume they did, but I didn't.

Q. You don't know whether anybody else did?

A. I would assume they did, obviously.

Q. In other words, you assume they did talk to Fox and get Fox to waive clearance?

A. I don't know about that.

(Testimony of Fred Greenberg.)

Mr. Mitchell: I object to the question on the ground it has been asked, and it is immaterial.

The Court: The witness says he doesn't know. Let's go to another matter and maybe we can find some phase of this question that he knows or remembers something about.

The Witness: It isn't too easy.

Q. (By Mr. Corinblit): Mr. Greenberg, did you ever have any discussion with Fox to ask them if they would waive clearance over Paradise?

A. Did I ever have a discussion with Fox?

Q. Yes.

A. About waiving over Paradise? No, sir, I don't remember any such discussion. I remember some discussions with the Paradise.

Q. Yes. We will get to those in a minute. Mr. Greenberg, turning to the picture Three Secrets, after a bid had been awarded to the Academy Theatre, did you have any discussion with representatives of the Paradise to ask them if they would play Three Secrets? Do you recall any distinct conversation? [2716]

A. About one specific subject?

Q. Yes.

A. That would be a rather difficult thing to reach for.

Q. So you don't recall? A. No, sir.

Q. Do you have any recollection of a conversation with representatives of the Paradise about the picture Rocky Mountain after you had sold the pic-

(Testimony of Fred Greenberg.)

ture to the Academy Theatre on a 7 day availability?

A. I have had many discussions with the operators of Paradise with reference to many pictures, but to pinpoint one thing is rather a difficult thing to do after four or five years has elapsed. I can answer that for you in a very definite way that you might consider general, but I have discussed the matter of releasing pictures in that area with Mr. Lehman many times and Mr. Johnson many times, and in every instance they were given an equal opportunity to bid for that picture, to compete with, not necessarily the houses you have been pointing out so much as the point that was made by the La Tijera, who insisted upon competing on each individual subject on an equal basis as it was offered Mr. Paradise in every case.

Q. Mr. Greenberg, I want to get a very specific question answered on what your procedure was. As you defined it [2717] here, you would first send out bid requests, and in the bid any man who won the bid got clearance over all the theatres that had been enumerated from the Paradise to the Southside.

A. Unless he designated otherwise.

Q. Unless he designated otherwise. Now, after the bid on the print was awarded, then you said you went out and negotiated to license second day and date runs. Now, I want to ask you whether or not on the second run of the picture Rocky Mountain you remember having a conversation with anyone at the Paradise.

(Testimony of Fred Greenberg.)

A. I told you I don't remember any distinct—any conversation about any one single motion picture.

Q. All right.

A. I remember many conversations with them, however.

Q. All right, but you don't recall, you cannot give us any specific conversation about any of the pictures listed upon this board for the second run, is that correct?

A. There was a lot of pictures under the dam since then.

Q. But you don't have any recollection?

A. No, sir.

Q. In evidence in this case, Mr. Greenberg, is a letter dated March 26, 1951, from Mr. Lehman to you with respect to the picture *Born Yesterday*.

A. That was not my picture.

Q. The letter is to you, Mr. Greenberg. [2718]

A. Oh, I see. Well, this isn't my picture. I wish we had a picture like that that did the gross this *Born Yesterday* did. That was a picture that did a tremendous gross nationally and locally.

Q. You remember, don't you, that certainly after this letter Mr. Lehman was writing or talking to you about negotiating for the Warner pictures after you had awarded them on a bid, isn't that right?

A. Mr. Lehman discussed negotiating, never bidding, because he refused to negotiate or bid in competition with the *La Tijera*, who insisted upon

(Testimony of Fred Greenberg.)

competing with him for whatever product or picture was available from us.

Q. Now, is it your testimony that the La Tijera insisted on bidding for the second print?

A. Any print.

Q. All prints?

A. Any print that would—inasmuch as he considered himself in direct competition, more so than with any other theatre, that is with reference to the La Tijera and the Paradise, he declared himself, Mr. Johnson declared himself, and subsequently—I mean Kupper first and then Johnson, I think it was, and in my discussions with Mr. Lehman he wanted to negotiate without any regard for competition. He wanted what we called a free ride.

Q. Is that what you were giving the Southside? [2719]

A. Substantially.

Q. In other words, that is what you were giving the Southside. A. Pretty much.

Q. The La Tijera didn't have any objection to the Southside playing day and date with the Academy. A. Evidently not.

Q. But the La Tijera objected to the Paradise playing day and date with the Academy?

A. Feeling they were in stronger competition with the other.

Q. But the La Tijera didn't get the pictures. Why would they object to the Paradise playing day and date with the Academy?

(Testimony of Fred Greenberg.)

A. That didn't change the position at all of the La Tijera. If we were to make three runs available, Mr. La Tijera would then insist if we were to make a picture available in that area, if we were to open up a third run, the Paradise would then be required to bid against the La Tijera because of the request of the account, not because of our request.

Q. You don't like bidding?

A. Yes and no. Whenever it suits the purpose. We were probably the last company in the business to enter into bidding, and if it makes my job easier, I like bidding. [2720]

Q. Well, at this time, was your company in favor of bidding?

A. They were just starting out bidding. I think about that time they were the last company, as I said, to enter into bidding. They discouraged bidding.

Q. I want to get this clear, Mr. Greenberg, that when the Academy won the picture the La Tijera objected to the Paradise getting the second print?

A. Not all all. They didn't object to it. If we were going to open up a bid, I certainly would take the Southside in preference to either the La Tijera or the Paradise because of the greater revenue to us.

Now, if we were going to make a picture available and the Southside wasn't interested and we had this second run, I would then be required—I was on the horns of a dilemma. If I moved one

(Testimony of Fred Greenberg.)

way or the other, the one man refused to bid, Mr. Paradise refused to bid.

Q. Just like the Southside?

Mr. Mitchell: Let him finish his answer.

The Witness: I don't think that has anything to do with it in this particular case because the Southside wasn't involved in this particular bid of competitive feeling. There was strong feeling insofar as the Paradise and the La Tijera was concerned.

I was told bluntly and flatly that if a picture—if we [2721] were going to negotiate with the Paradise, that the operators of the La Tijera insisted upon competing for that run through negotiation or bidding or through any other manner we cared to market the picture. And they said that they would give us more money than the Paradise would.

I in turn would talk to Mr. Lehman at that time, and he wanted to buy the pictures regardless of the feelings of the operators of the La Tijera under the circumstances. It was as simple as that.

I had to pick out which jail I was going to go to.

Q. (By Mr. Corinblit): Now, you understand, Mr. Greenberg, that we are talking here about the second print and not the third.

A. Yes, I know what you are talking about.

Q. I want to get this clear. It was because of the objections of the La Tijera that you would not sell a print day and date with the Academy Theatre in Inglewood?

A. Well, of course, as you know, Mr. Corinblit,

(Testimony of Fred Greenberg.)

these bidding forms indicate a clearance over all of those theatres, and I admit that we violated them insofar as the Southside was concerned.

There was no objection raised. They returned considerable money to our company and since we got away with it, we got away with it. It is a pretty good deal when you get away with it. [2722]

Q. When you say "you got away with it," Mr. Greenberg, you got away with it by the help of Fox West Coast, didn't you?

A. I just say we got away with it. I didn't need any help.

Q. That is to say Fox West Coast never protested to you? A. Not that I remember.

Q. When you played day and date at the Southside? A. That is right.

Q. Now, the real fact is, Mr. Greenberg, the company that prevented you from playing day and date with the Academy was Fox—they wouldn't waive clearance over the Paradise?

A. Again I come right back, Mr. Corinblit—you are bringing up the one point, and I think it is so simple. It is just as simple as it can be because in every case and under every circumstance when a picture was made available, if there was a run to be made available to one of two theatres which you would have me, or the Paradise would have me, rather, deny the right to the La Tijera to buy the picture, giving me better terms with clearance over the Paradise, but the Paradise wanted that right with a free ride.

(Testimony of Fred Greenberg.)

Well, I couldn't arrange that for them.

Q. Now, Mr. Greenburg, I think you must misinterpret my question. My point is that having sold the picture to [2723] the Academy first run with clearance over the Paradise—— A. Yes.

Q. ——the only way you could sell to the Paradise was to get the Academy to release clearance and the Academy wouldn't release clearance?

A. That is right. But under those circumstances, we come right back to the same proposition that I had the La Tijera to contend with.

Q. Now, let us talk about the La Tijera for a moment.

Did you ever ask the La Tijera and the Paradise to bid only against each other? A. Yes.

Q. You did? A. Yes.

Q. All right. When did you do that?

A. Oh, I don't know just when, but I know very definitely that Mr. Lehman refused to bid just against the La Tijera.

Q. Just against the La Tijera? A. Yes.

Q. Do you have a letter on that or a memorandum? A. No.

Q. On that point?

A. No, but a very good memory on it.

Q. Now, did you talk to Mr. Lehman about that?

A. Many times. [2724]

Q. You talked to Mr. Lehman many times?

A. Yes.

Q. About him bidding only against the La Tijera?

(Testimony of Fred Greenberg.)

A. I don't know how to make this any more clear than what I have done.

I have told you that in every case where a picture was to be made available, regardless of whether it was one, two or a dozen runs, if that picture was to be made available to the Paradise or we were to negotiate with them, the La Tijera, Mr. Kupper or Mr. Johnson would insist upon the right to compete with that particular theatre.

Q. My question to you, Mr. Greenberg, again is—I thought you answered it but maybe you want to change your answer, and that is whether or not you ever said to Mr. Lehman: "I will let you bid for the second or third print just against the La Tijera." A. It amounted to that.

Q. You did say that to Mr. Lehman?

A. I say it amounted to that under any circumstances. I asked him if he wanted to compete with the La Tijera for a run.

Q. Now, did you say to Mr. Lehman—— [2725]

A. Pardon me. I can't ask questions. Go ahead.

Q. Did you say to Mr. Lehman that if you will give me \$1500, if you will give me more than the La Tijera I will let you have the print?

A. That would be auctioneering.

Q. And you don't do that?

A. No, sir, that is not very ethical nor decent nor good business.

Q. Now, in fact, Mr. Greenberg, the only basis upon which you would permit the Paradise to ob-

(Testimony of Fred Greenberg.)

tain a picture from Warner's on the 7 day availability was if it entered into bidding, isn't that correct?

A. If they provided me with the best bid.

Q. But that was the only way that the Paradise could obtain a picture, was to win it by bidding?

A. Right.

Q. But the Southside Theatre got the picture without bidding, right? You can answer that "Yes" or "No."

A. They got them.

Q. Now, I think, Mr. Greenberg, Mr. Mitchell asked you about some kind of a relationship between Mr. Herbel, who is now dead, and Mr. Wolff.

I am sure you didn't mean to make any inference whatsoever that Mr. Herbel, who is now deceased, did anything incorrect in his dealings with Mr. Wolff? [2726]

A. I never knew of Mr. Herbel to do anything that he didn't feel to be honorable. He might have made a lot of mistakes and I think I will confess to a few myself.

Q. And you didn't mean to infer that Mr. Wolff in his dealings with Mr. Herbel ever sought to do anything incorrect or improper?

A. I would like to think not.

Q. You do think not?

A. I would like to think so. I do think not.

Q. I would like to turn for a minute, Mr. Greenberg, to the facts surrounding the initial contact between you and the Paradise Theatre.

(Testimony of Fred Greenberg.)

I want to call your attention to the month of March, 1950.

A. Was that prior to the opening of the Paradise?

Q. Yes. The Paradise Theatre opened in August, 1950, and this was in March, 1950.

Do you remember that Mr. Schreiber and his son came to the offices of Warner Bros. and talked to you and Mr. Herbel about pictures for the Paradise Theatre?

A. I remember something of having had some discussion with Mr. Schreiber.

Q. And do you remember that at that time Warners took the position that the only way that the Paradise could obtain 7 day pictures was to bid?

A. Yes.

Q. Now, at that very moment when you were telling the Paradise that the only way they could obtain pictures was to bid, in fact you were selling your pictures on the 7 day availability in the Inglewood-Westchester area without bidding, isn't that correct? A. That is right.

Q. Now, that answer to my question is different than the answer you gave me when I took your deposition, is it not? A. I don't know.

Q. You don't remember when I took your deposition and asked you this same question that you told me that in March of 1950 and prior thereto, Warners were selling their 7 day pictures on bidding. You don't remember that?

A. Do you want me to tell you about our first

(Testimony of Fred Greenberg.)

meeting with Mr. Schreiber and he didn't discuss the matter of 7 day when he first came into my office. You are talking about the first time Mr. Schreiber came in to discuss product with me?

Q. Now, I am talking about, Mr. Greenberg, the fact that when I took your deposition in June of this year and asked you whether as of March, 1950 and prior thereto you were selling your pictures on a bidding basis, you said you were.

A. Well, we weren't selling them—formal bidding, you mean? [2728]

Q. Any kind of bidding.

A. Again, Mr. Corinblit, I will have to come back to the one thing I have been trying to get across to you and I seem to be somewhat unable to get this story across, that the word "bidding" or "competing" came into our discussion—it was because of the attitude of the operators of the La Tijera Theatre.

Now, if any discussion was involved concerning whether or not Mr. Schreiber or anybody else who was booking or buying for him, was to buy pictures he would have to consider the La Tijera as an active and vigorous competitor, who had their own fine theatre and their own interests at heart.

Even Mr. Schreiber did and he has a right to, but I couldn't choose sides. We had to do it fairly.

Q. Mr. Greenberg, when I took your deposition a month or two ago and asked you how you were selling pictures in the Inglewood-Westchester area

(Testimony of Fred Greenberg.)

in 1950, you told me that you were bidding at that time, is that right?

A. I would have to look at my deposition.

The Court: I suggest counsel show the witness his deposition.

The Witness: I don't know.

The Court: And if you wish to and it is impeachment, you can read it to the jury, but don't argue with the witness.

Q. (By Mr. Corinblit): Mr. Greenberg, I will show you a [2729] copy of your deposition at page 16 and ask you to look at line 13 or line 14 through line 23.

(Handing document to the witness.)

The Witness: Well, the question is:

"Well, I don't know—" just a minute.

The question is:

"What would you have to look at?

"A. Well, I don't know what I would have to look at. The bidding forms.

"Q. To see whether there was bidding during that period?

"A. Yes. It indicates it was a bidding situation insofar as clearance is concerned, but I would have to take a look and see how each one of these pictures was marketed to be able to give you an answer as to why each one of them—generally I would say it was because of the better deals out of the La Tijera in that particular area."

Is that how far you want me to go?

Q. (By Mr. Corinblit): Yes.

(Testimony of Fred Greenberg.)

A. Where did I say something different in there from this testimony?

Q. Is it your testimony that there was bidding in March of 1950 or that there was not?

A. I had some information which I must have gotten off [2730] of the records because I certainly couldn't rely on my memory.

Q. Now, do you remember what records we looked at at that time? A. No, I don't. [2730-A]

Q. I will show you, Mr. Greenberg, cut-off card for the La Tijera Theatre, 1949 and 1950 season, which is also marked Exhibit 1-A in your deposition, which document has already been admitted in evidence.

Now, I call your attention to the words down in the left-hand corner.

A. "Bidding situation."

Q. Yes.

A. That is where I got my information.

Q. All right. Was that bidding information deliberately put on there, Mr. Greenberg?

A. What do you mean?

Q. That is, was there bidding at that time?

A. I told you I did not remember.

Q. Now do you remember? You don't remember now? A. Formal bidding?

Q. Any kind of bidding.

Mr. Mitchell: There is a difference in Warner Bros. between formal bidding and competitive negotiations, and this type of—Mr. Corinblit knows that, and this type of examination leads to confusion

(Testimony of Fred Greenberg.)

rather than light. I object to it upon the ground that it is argumentative.

The Court: Overruled.

Q. (By Mr. Corinblit): Was there bidding? You can answer that and then if you want to tell us what kind of bidding there [2731] was, that's all right, too.

A. That indicates there was some sort of bidding.

Q. Some sort?

A. Yes. It might very well have indicated exactly what I have been trying to get across to you, and I seem to be ineffective.

Mr. Corinblit: Your Honor, this might be a good time for the recess.

The Court: I suggest to the witness that it is not important what you get across to Mr. Corinblit. It is important what you get across to the jury, because Mr. Corinblit is not deciding this case. The jury is deciding the case.

The Witness: I hope I have got it across to the jury.

The Court: Ladies and gentlemen of the jury, we are about to take another recess. Again it is my duty to admonish you you are not to discuss this case with anyone, you are not to allow anyone to discuss it with you, and you are not to formulate or express any opinion as to the rights of the parties until this case has been finally submitted to you.

With that admonition court will now stand in recess until 10 minutes after 3:00.

(Testimony of Fred Greenberg.)

(Recess.)

The Court: Is it stipulated the jury is present in [2732] the box?

Mr. Corinblit: So stipulated, your Honor.

Mr. Mitchell: So stipulated.

The Court: You may proceed.

Q. (By Mr. Corinblit): We were talking, Mr. Greenberg, about the situation as of March, 1950 when Mr. Schreiber and son came in to see you and Mr. Herbel about pictures for the Paradise, and we were talking about what was at that time the manner in which Warners was selling its pictures.

Now, in fact, you knew that at the very moment, at that very moment there was in the Inglewood-Westchester area an arrangement between Fox, La Tijera, United Artists and your company and other companies whereby your pictures were to go to the La Tijera and Imperial day and date, you knew that, didn't you? A. No, sir.

Q. You had a suspicion about it.

A. I don't remember any suspicion.

Mr. Mitchell: What period of time are we talking about now?

Mr. Corinblit: At the very time Mr. Schreiber made his visit to Warners in March, 1950.

Q. I will ask you, Mr. Greenberg, to look at your deposition at page 23 and ask you to examine the question at line 8 and your answer at line 12.

The Court: Read it to yourself. Don't read it aloud.

(Testimony of Fred Greenberg.)

The Witness: I'm glad you said that, your Honor.

Q. (By Mr. Corinblit): Mr. Greenberg, does that refresh your recollection that in fact in March, 1950 you had a suspicion that there was such an arrangement there?

A. It doesn't so state in my deposition.

Q. All right. I am reading now from the deposition, page 23.

"You state that as of 1949 and 1950 you had no opinion at that time that there was an arrangement between the exhibitors in that area whereby Warners product would go to the La Tijera on the 7 day availability?

"A. I may have been suspicious at the time. I don't remember."

Now, did you have——

Mr. Mitchell: Wait a minute. I want to go on and read a little more.

Mr. Corinblit: "What did you do about the suspicion?

"A. What could I do about the suspicion?

"Q. What did you do?

"A. Nothing. I just continued to submit bidding forms and make the pictures available to [2734] everyone in the area."

Q. Now, do you remember, now Mr. Greenberg——

Mr. Corinblit: Do you want to read any further, counsel?

(No response.)

(Testimony of Fred Greenberg.)

Q. (By Mr. Corinblit): It is a fact that you suspected at that time that there might have been some arrangement among the exhibitors?

A. I say I may have had.

Mr. Mitchell: I object that it is immaterial what he suspected, your Honor. We want facts, not suspicions.

Mr. Corinblit: Your Honor, in this particular case, what Warners does may depend upon what they believe, as well as whether in fact there was—we have had plenty of testimony about the arrangement.

Mr. Mitchell: What Warners does isn't going to depend upon any suspicion of Mr. Greenberg's at that time.

The Court: Read the question. Objection overruled.

(Question read.)

Q. (By Mr. Corinblit): Is that right, Mr. Greenberg?

A. Did you read that out of my deposition?

Q. I beg your pardon?

A. Was that read out of my deposition.

Q. I am paraphrasing your answer in the deposition.

Mr. Mitchell: And I am saying he is not paraphrasing [2735] the answer in the deposition.

The Court: Might I say to the witness it doesn't make any difference where he is reading it from. He may be making it up out of whole cloth. Your

(Testimony of Fred Greenberg.)

problem is to answer the question. It doesn't make any difference where the question comes from.

Read the question again.

(Question re-read.)

The Witness: I said there may have been. I don't remember.

Q. (By Mr. Corinblit): When you answered the question that there may have been, are there any facts that you base that statement on at all that you remember? A. Not at all.

Q. You remember that there was a period of time just about at that time that your pictures were going quite regularly into the La Tijera and the Imperial day and date, do you remember that?

A. I know that there were quite a number of pictures that did play those two houses day and date. I don't remember, nor can I pinpoint a time nor the releases.

Q. Now, it was your opinion at that time that the Academy Theatre was a stronger theatre for your pictures than the La Tijera, was it not?

A. Yes, I think the Academy is the strongest theatre in [2736] Inglewood.

Q. So that your pictures were going regularly into the——

The Court: Just a minute, Mr. Corinblit. Now, will you define the meaning of the word "stronger?" Stronger in what way?

The Witness: Better grosser.

The Court: A better grosser?

The Witness: Yes.

(Testimony of Fred Greenberg.)

Q. (By Mr. Corinblit): So that you knew that at that time your pictures were going quite regularly into the La Tijera and Imperial and that the La Tijera was a weaker theatre for your pictures, less grossing theatre than the Academy?

A. Right.

Q. Don't you remember in the light of that fact that you knew there was an arrangement whereby your pictures were to go to the La Tijera and Imperial and that no one else was to bid for them?

A. There was no bidding in that area at that time, as I remember, formal bidding. We negotiated for the best houses we could get, not only in Inglewood, Hollywood, any place where we market pictures. If you can't get into the one house, you take the next best.

Q. Mr. Greenberg, the testimony in this case by Mr. [2737] Pirosh is that——

Mr. Mitchell: Wait a minute, your Honor. I don't think that is proper in view of your Honor's statement, to be repeating someone else's supposed testimony.

The Court: I don't think it is proper to question the witness upon the testimony of another witness. If the testimony of two witnesses doesn't agree, that is for the jury to resolve the problem.

Mr. Corinblit: All right.

Q. Mr. Greenberg, do you deny that someone from the La Tijera told you in 1949 that there was an arrangement with Fox West Coast and United Artists whereby the La Tijera and Impe-

(Testimony of Fred Greenberg.)

rial Theatres were to get Warner product on the 7 day availability?

A. Mr. Herbel handled Inglewood and the houses involved, Mr. Corinblit. [2738]

Q. Mr. Greenberg, Mr. Mitchell—well, I will withdraw that.

Your pictures—the kind of terms that Warners was getting for its pictures in 1950 and 1951 after the Paradise opened its doors, you would sell your pictures sometimes on a flat rental on seven days, is that right? A. Right.

Q. And you would sell your pictures sometimes on a percentage seven-day availability?

A. Yes.

Q. Now, on a flat rental that means that the exhibitor—you agree with the exhibitor that he will pay you \$500 or \$750 flat rental for the picture, is that right? A. That is right.

Q. And when you have a percentage basis, straight percentage, the distributor—the exhibitor says to you and you agree, that he will pay you 35 per cent of whatever comes into the box office.

A. That is right.

Mr. Mitchell: Or some other percentage.

Mr. Corinblit: Some other percentage.

Q. Now, if you sell your pictures on the seven-day on a flat rental that flat rental does not have anything to do directly with any overhead that the exhibitor has, does it? A. No, it does not.

Q. And if you sell your pictures on a straight percentage basis, a percentage of the gross, 35 per

(Testimony of Fred Greenberg.)

cent, for example, that percentage agreement does not have any direct relationship to any overhead.

A. Entirely based upon what is taken in at the box office.

Q. And no relation to overhead.

A. Not in that sort of percentage. We do have percentage deals where the overhead is very much an important part of the negotiations.

But where there is a straight percentage, 35 per cent of the gross, it is not involved?

A. That is right.

Q. Now, you know, don't you, that during '50 and '51—well, I will withdraw that.

Now, sometimes you have a deal whereby an exhibitor says, "I will pay you X percentage of the gross receipts up to" a figure. Let us say \$5,000.

A. Yes.

Q. "And then I will give you 66-2/3 per cent or 50 per cent over that figure."

A. Quite often.

Q. That happens on occasion, too?

A. Yes.

Q. Now, when you have—you remember, don't you, that during 1950 and '51 on the seven-day availability those were the terms upon which you generally sold your pictures—that is, either the flat straight percentage or percentage to a straight figure and such and such a figure over?

A. That is the way we sold pictures then and that is the way we sell them now.

(Testimony of Fred Greenberg.)

Q. When you sell one run on a straight percentage then, 35 per cent of the gross, whatever comes into the box office you get 35 per cent. If you sell a second run day and date with the first run, 35 per cent of the gross, you will take 35 per cent of both grosses as they come into the theatre and if you were to sell a third run on the 35 per cent basis you will take 35 per cent of whatever gross comes into the box office at the third theatre.

A. That is right.

Q. That would be the case, would it not?

A. Yes.

Q. Or if it was a flat rental basis, if you sold on a flat rental basis for \$1,000 to each theatre, you would get a flat rental of \$1,000 from each theatre.

A. That is right.

Q. Having in mind that basis, Mr. Greenberg, and the way you were selling as you have testified in 1950 and '51 as far as Warner's were concerned, if you would have sold a second run, a second print, to the Paradise or a third print [2741] to the Paradise, Warner's wouldn't be carrying any overhead of the Paradise, would it?

A. Nor did I indicate that it would, but I did bring out and again I am addressing this to the jury, because it brings up again this very one point that I am trying to get across.

I could sell 50 runs and it sounds like a very good business deal to do so, if you had that many prints to distribute, to take 35 or 40 per cent of

(Testimony of Fred Greenberg.)

the runs that came in with that sort of—those terms, taking 40 per cent of every dollar that came into 50 theatres, in this particular case again the La Tijera insisted upon bidding, negotiating for the motion pictures that would be available to this Paradise on an equal, given equal opportunity to negotiate for that picture and the Paradise refused to enter into negotiations on that basis. That is all.

Q. Now, Mr. Greenberg, I want to call your attention to this statement of yours re the La Tijera Theatre. You don't know—I will withdraw that.

First let us talk about the Academy situation. You testified before that the Academy bought the pictures on the bid with clearance over the Paradise and over the Southside and somehow you were able to get away with selling the Southside day and date. As far as the Paradise is concerned, the Paradise didn't get any of your pictures day and date with the [2742] Academy.

Now, you don't know, do you, whether or not it was the Academy's purpose in refusing to permit the Paradise to play day and date with the Academy to protect the Loyola Theatre from the competition of the Paradise?

A. I don't think that was involved. I come right back to the same thing that I just told the jury. That same thing existed. I couldn't escape it. That is the dilemma which I was in at the time and it existed until the La Tijera went out of business.

Q. Now, then, you don't know whether that was

(Testimony of Fred Greenberg.)

the purpose of the Academy in refusing to waive clearance over the Paradise—whether the purpose was to protect the Loyola?

A. It never occurred to me that that happened. I don't believe that existed at all. It may have been—I just can't see it. We had very little negotiation with any motion pictures at the Loyola. Probably a couple of pictures that played as B's, but I never negotiated with Fox or anybody else at the Loyola. It has nothing to do with us as far as I am concerned or the company. [2743]

Q. You don't know when the La Tijera Theatre said they wouldn't let you sell it to the Paradise, whether they were protecting the Loyola Theatre, either, do you?

A. No, they didn't say that I couldn't sell the Paradise as such. They just told me they wanted to bid against the Paradise. They didn't say I couldn't sell them, and I didn't say that I wouldn't have sold them if they would have met the conditions. They were reasonable and fair and just to everybody concerned.

Q. Mr. Greenberg, I placed upon the board an exhibit in evidence, Plaintiff's Exhibit 63, which shows the film rental that the Paradise paid you for the picture Tea For Two. That was about \$1500 which they paid you and which was played about three weeks after they opened.

A. Who paid that?

Q. Paradise.

(Testimony of Fred Greenberg.)

A. That was one of those three pictures?

Q. At the beginning.

A. At the beginning?

Q. Yes, opening beginning.

A. I know——

Q. This list also shows another group of pictures played in 1949 and '50. A. Yes.

Q. Comparing the film rentals you got from the [2744] Paradise for that picture, \$1500, with the film rental you were getting from the Academy Theatre—now, we haven't put on the list of what you were getting from the La Tijera——

Mr. Westbrook: Do you want to identify the pictures, counsel? It is hard to talk about film rental without talking about pictures.

The Witness: I just don't know.

Mr. Corinblit: Do you want me to read them into evidence.

The Witness: I don't remember them at this stage of the game.

Mr. Corinblit: Release 911, Lady Takes A Sailor. Release 991, Stage Fright.

Release No. 921 is The Damned Don't Cry.

922, Colt .45 and 930, Flame And The Arrow.

Release 005, The Breaking Point.

006, Three Secrets and 007, Glass Menagerie.

These are the comparative figures.

Q. Now, you remember, don't you, that this \$1500 figure that you got from the Paradise three weeks after they opened, three or four weeks after

(Testimony of Fred Greenberg.)

they opened, was 35 to 50 per cent more than you had been receiving on the 7 day availability prior to that time, don't you?

Mr. Mitchell: I object to it on the ground it is argumentative. The rentals show that some were higher than \$1500 and some were lower. It is argumentative. [2745]

The Court: I think it is argumentative. You are arguing to the jury. The facts have been established.

Mr. Corinblit: Perhaps there is a misapprehension. I am not now talking about just these figures on the board. I am talking about rentals being received by Mr. Greenberg's company prior to this \$1,500 figure, not just these figures, but when they sold pictures to the La Tijera and other theatres. This is showing a comparison with the Academy.

Mr. Greenberg testified to this matter in the deposition, but the question is whether or not he remembers as a fact that at the time he got \$1500 from the Academy, that that price was 35 to 50 per cent more in film rental than he was regularly receiving from other accounts for the 7 day availability.

The Witness: But not from the area. He has indicated up there, I can see at this distance, that we earned \$1,581 or 61, and when you are talking about the La Tijera, you again come to that dilemma about which I have been telling you, but when you are talking about our revenue out of

(Testimony of Fred Greenberg.)

Inglewood, \$1500 under the circumstances was not an unreasonable figure. It was not one that I established. You didn't bring out the fact that we had two other pictures prior to that from your Paradise where they gave them the so-called free ride for ever so much less, much less than we could have gotten if we had otherwise marketed the picture. [2746]

Q. (By Mr. Corinblit): Mr. Greenberg, I know the kind of argument you are trying to make, and I want to direct your attention to the question——

Mr. Mitchell: I object to the statement of counsel and request the court to have him ask questions and not lecture the witness.

The Court: I suggest you don't try to argue with the witness. If you have got a question of fact, put it.

Mr. Corinblit: All right. My question is again, Mr. Greenberg, whether you remember that the \$1500 figure you got for the picture Tea For Two was from 50 per cent to 35 per cent more than what you were regularly getting for the 7 day availability in Inglewood at that time?

Mr. Mitchell: I object to that as being immaterial. Tea For Two according to Marco and others was a very high class picture, and what they got for some other picture is immaterial.

The Court: Overruled.

The Witness: Now, let's get to the question.

The Court: Do you remember the question? Read the question.

(Testimony of Fred Greenberg.)

(Question read.)

The Witness: Looking at the chart up there, I would say no.

Q. (By Mr. Corinblit): I will show you your deposition, [2747] Mr. Greenberg, and ask you to read the deposition, your question beginning at line 13 on page 33 and running over to line 4 on page 34.

A. From where to what?

Q. The question there.

A. Oh, yes, I see. I don't follow that.

Q. Just to line 4. That is as far as you need go.

A. Yes, but I want to read what Mr. Mitchell says. That is what you say.

Q. Now, does a reading of those questions and answers, Mr. Greenberg, refresh your recollection?

Mr. Mitchell: You will agree he was looking then at the La Tijera cut-off card, right?

Mr. Corinblit: La Tijera cut-off card, the La Tijera, which played most of the pictures, certainly.

The Witness: The La Tijera card was not—the La Tijera Theatre was not necessarily the best house to go into under these circumstances. On that board that you have up there, I see 1,581. What picture that was, I don't know, because you have a number there and I don't remember them. But you have some other figures that are close, 1250. I indicated, of course, that that was a lot of money for the Paradise to pay for the picture. I know that we were led to believe that the Paradise was

(Testimony of Fred Greenberg.)

going to be a big grosser and there was every reason to believe we were going to earn that kind of money. Otherwise, we shouldn't have been encouraged to move into the house and take the product away from other outlets where we knew what we could do. We were gambling on the house, giving it its first pictures, without any assurance of what our return would be. As a matter of fact, there was an adjustment made, I believe, on one of the pictures that played before that, because it didn't do as well as could be expected, and that was done because, I believe, of the warm friendship between Mr. Marco, who also operated the Southside, and Mr. Herbel. I did not enter into those negotiations. I was merely told by Mr. Herbel to establish the \$1500 fee in order to protect our company. I did that and got the money.

Mr. Corinblit: I would like to read the following questions and answers at page 33, line 12.

"Q. You note that the \$1500 for that one week of Tea For Two is 75 per cent more on the average than most of the pictures that were playing on 7 days during the preceding season?

"A. It seems that way—what did you say? 75 per cent more?

"Q. Yes.

"A. I don't think it was 75 per cent, no.

"Q. All right. Take a look at the figures on it.

"A. Well, it is—I see figures of \$500, 650, [2749] 3825, 1250.

"Q. I think you are looking at—we are talking

(Testimony of Fred Greenberg.)

about the comparison with the season just preceding that. I think Mr. Files may have the card.

“A. Well, I think that—I still say that the amount you say, 75 per cent more, is a little bit out of line.

“Q. 50 per cent more; is that right?

“A. Probably. 50 per cent more and sometimes 35 per cent more or less.”

Q. Now, the fact is, Mr. Greenberg, that even after you got \$1500 from the Paradise, in accordance with the testimony, you didn't let the Paradise have any opportunity to obtain your pictures on 7 day availability except if it bid, and for the second print you would not permit the Paradise to obtain any Warner picture on the 7 day availability, isn't that right?

Mr. Mitchell: I object to that, your Honor, as being a compound question, and also argumentative.

The Court: I think it is compound. Break the question down into separate parts.

Mr. Corinblit: All right.

Q. The fact is, Mr. Greenberg, after you got \$1500 from the Paradise, you would not permit the Paradise to obtain your [2750] pictures on the 7 day availability?

A. They—as a matter of fact, the result that we—our pictures—the performance of our pictures in the Paradise would certainly discourage me from going into the house.

Q. So that you did not permit them to get 7 day?

(Testimony of Fred Greenberg.)

A. I didn't say that, and I won't say that, and I will repeat what I have been telling you and what I have told the court, that the La Tijera insisted upon bidding or negotiating, being given equal opportunity for whatever pictures there was, and in this particular case the three pictures were taken arbitrarily away from them. They weren't given any opportunity. They were the ones who were badly treated, not the Paradise. The Paradise was given an opportunity and a chance to test it and to prove it, to see what they could do as a new house.

I think it was quite a gesture on the part of Mr. Herbel. I doubt that I would have done it.

Mr. Corinblit: No further questions.

The Witness: I am sure I wouldn't have.

Mr. Corinblit: No further questions.

Mr. Johnston: May I ask a question?

The Court: Yes.

Redirect Examination

Q. (By Mr. Johnston): Mr. Greenberg, you mentioned a Mr. Johnson in [2751] connection with the La Tijera Theatre. That is Mr. Earl Johnson, is it not?

A. Yes, it is. I want to apologize to you, Mr. Johnston. I had that bit of difficulty with you before.

Q. Anyway, it is not I?

A. Both Johnsons are fine men. I am very fond of both of them.

(Testimony of Fred Greenberg.)

Mr. Johnston: Thanks. I have no further questions.

Mr. Mitchell: Your Honor, in the examination of Mr. Lehman, when he testified he used certain memoranda which I desire to introduce in evidence while the subject is here and read to the jury.

I will try to use the plaintiff's number on these so there won't be any confusion in the record.

The Clerk: Do you have the 11 series, Mr. Corinblit?

Mr. Corinblit: Yes, I think I have them. [2752]

Redirect Examination

Mr. Mitchell: I will offer Plaintiff's Exhibits 11-H and 11-B-1 in evidence.

Mr. Corinblit: Object, your Honor, upon the ground that no foundation has been laid and upon the ground that they are immaterial and incompetent as evidence, and upon the further ground that Mr. Mitchell and Mr. Johnston objected at the time we offered Mr. Schreiber's memoranda in evidence and the court refused to permit those documents to go into evidence. [2753]

* * * * *

The Court: They have withdrawn their objection and inasmuch as they have done that they may be received in evidence.

The Clerk: Do you want them to go in as your exhibits?

Mr. Corinblit: Yes, we will put them in as our exhibits. [2756]

(Testimony of Fred Greenberg.)

Mr. Mitchell: It doesn't make any difference how they are marked.

The Clerk: 11-D-1 and 11-H.

(The documents referred to were received in evidence and marked as Plaintiff's Exhibits 11-D-1 and 11-H.) [2757]

* * * * *

Q. (By Mr. Mitchell): Now, with respect to this matter of licensing pictures in the Southside and the Paradise, do you remember in the fall of 1950, up through the middle of December, who it was that was negotiating or bidding for both the Southside and the Paradise? A. Marco Wolff.

Q. Now, on the picture Three Secrets in which the bid went to the Academy and the picture was also licensed to the——

Mr. Corinblit: Southside.

Q. (By Mr. Mitchell): ——to the Southside and it was stipulated that Three Secrets then played the 14 day availability at the Paradise, do you know who negotiated that succession of runs for the Paradise and Southside?

Mr. Corinblit: I object to that—well, go ahead.

The Witness: Well——

The Court: Just a minute. Read the question.

(Question read.)

The Court: Objection overruled.

The Witness: You mean the two runs that you are talking [2759] about, is that it, Mr. Mitchell?

Q. (By Mr. Mitchell): Well, this exhibit used by the plaintiff, which I guess was not introduced,

(Testimony of Fred Greenberg.)

shows that Three Secrets played 7 day availability at the Academy and the Southside and our stipulation was that the fourteen day availability of that picture then played the **Paradise**.

Now, do you know who negotiated with Warners for the 7 day availability with the Southside and the 14 day availability for the Paradise?

A. Mr. Wolff.

Q. And the same was true as to Rocky Mountain, isn't that correct, which played the Academy and the Southside, and we stipulated that it played 14 days at the Paradise.

A. Yes, sir.

Q. And the same is true as to Glass Menagerie which played at the Academy and the Southside, and then 14 days at the Paradise? A. Yes, sir.

Q. And the same is true as to Break Through which played at the Academy and the Southside on 7 days and then 14 days at the Paradise?

A. Those first negotiations that had to do with Marco Wolff at all—whatever pictures that were bought by Marco Wolff were bought with Mr. Herbel. I did not negotiate with him. [2760]

Mr. Corinblit: In the light of that I move to strike the answer of the witness in which he said he knows Mr. Wolff had the negotiations, because there is no knowledge. Isn't that correct, Mr. Greenberg?

The Court: Just a moment. The answer may go out.

Read the question, Mr. Reporter.

(Testimony of Fred Greenberg.)

(Question read.)

Q. (By Mr. Mitchell): When I say "The same is true," I am asking you if Marco Wolff negotiated for those two pictures.

A. That is what I testified to a while ago, that all negotiations with Mr. Wolff were carried on with Mr. Herbel.

Q. And was it Mr. Wolff that negotiated for these two theatres during that period of time?

A. For the Southside and the——

Q. And the Paradise?

A. Paradise. I would have to look that up, Mr. Mitchell. I just don't remember who negotiated on what particular picture. I would have to look that up.

I know that the first negotiations—I can't pinpoint the pictures—all of the first negotiations involving those two houses were carried on by Mr. Marco Wolff and by Mr. Herbel. [2761]

Q. All right. A. They negotiated.

Q. Now, you were asked about various types of deals, a flat deal, a straight percentage, and then a percentage involving—— A. A split figure.

Q. A split figure. Just tell the jury, if you will, please, when you negotiate a percentage involving a split figure, how the number of overhead affects your ultimate revenue.

A. A percentage deal with a split figure——

Q. You better tell them what that is.

A. Well, we will say a deal is sold at 35 per cent of a certain figure, and that is to \$5,000. The

(Testimony of Fred Greenberg.)

\$5,000 is arrived at through experience with the house or through experience with previous pictures that have played. We know pretty much what the house will gross. And through their expenses, overhead of the house. If the house is a good grossing house, and we can participate in a split figure, obviously we would get a lot more money. We get 35 per cent up to \$5,000, and very often it is either 50 per cent over that, and more than that, or $66\frac{2}{3}$, whatever it is we are able to negotiate, and, of course, if the gross does hit over \$5,000, the returns to us are much, much greater. That is obvious to you.

Q. What happens if you divide that gross among several [2762] theatres by playing them day and date?

A. Of course, you don't have near the chance of hitting the split figure, so you stay within the 35 per cent confines.

Q. That is the way your multiple overheads decrease the distributors' revenue?

A. That's right.

Q. Do you ever sell on a sliding scale?

A. We have sold on a sliding scale with a certain peg basis, that is a floor to it.

Q. Does the overhead, the number of overhead affect your profits on a sliding scale?

A. Very much so, because a sliding scale based on overhead plus revenue——

Q. Perhaps you had better explain the sliding scale to the jury.

(Testimony of Fred Greenberg.)

A. A sliding scale is a figure established by determining what it costs to operate a house, and then you base your grosses upon various stages. You move up to either 1 per cent or 2½ per cent as the gross goes up, and then, of course, for instance if a picture on percentage, that is sliding scale, was to hit 35 per cent, you go back to the original amount, and you participate in all of it, and if it hits 20 per cent, of course you get—I am not making myself very clear. [2763]

A sliding scale is merely a graduated scale based upon what the gross is, and as the gross goes up we participate to a greater amount and to a greater percentage.

Q. So that if you can keep all the gross in one house, you get more than if you split the gross among several? A. Obviously.

Q. You spoke about the La Tijera going out of business. When did the La Tijera go out of business, about?

A. Oh, I don't know. About 1953, I think. I just don't know exactly when. I think it was in 1953 some time. Maybe 1952. 1953, I think.

Mr. Mitchell: Now, with respect to this matter of Mr. Greenberg's deposition concerning bidding or negotiating in the early part of 1950, there were additional portions of his deposition which follow that which was read by Mr. Corinblit, which I would like to read. I can either read it now or tomorrow morning.

(Testimony of Fred Greenberg.)

The Court: Read it now while it is fresh in the mind of the jury.

Mr. Mitchell: All right. This follows the matter at page 16. I believe the start is in the neighborhood of line 14 that was made by Mr. Corinblit. I am reading from page 17 after the comment of counsel.

“Q. (By Mr. Corinblit): Is there anything else other than this notation, Mr. Greenberg, on which you rely [2764] in which you say the pictures went to the La Tijera Theatre as a result of bidding? Do you rely on your own recollection to that effect, too?”

He has reference to the paper, the cut-off card, with the words “bidding situation” on it.

The Witness: I referred to the records.

The Court: Are you reading a deposition now or questioning the witness?

Mr. Mitchell: I am reading the deposition, and trying to explain.

The Court: Then you are not in this.

The Witness: I am sorry.

Mr. Mitchell: You are not in the act.

The Witness: I don't know how to deport myself.

Mr. Mitchell: “A. No, not on my own recollection. That is a few years back.

“Q. Now, you say that if you look at the documents, the contracts and any requests for offers that might have been sent out during that time,

(Testimony of Fred Greenberg.)

you would be able to tell us whether or not that was the result of bidding, is that right?

“A. Yes. But inasmuch as it indicates it was a bidding situation I assume, naturally, it was bidding for the various releases and undoubtedly the best bid [2765] got the picture because we make all pictures available to everybody in a competitive area, giving them an equal opportunity to negotiate for whatever picture we make available.

“Q. Was the bidding that went on during that season the kind of bidding that you asked the Paradise to enter into when it asked for 7 day pictures?

“A. Well, what kind of bidding is there but bidding? Would you differentiate? I don’t know just what sort of an answer you want on that. Bidding is just bidding, whether we do it formally or whether we negotiate. In other words, bidding is merely a matter of another way of marketing.

“Q. Then your answer is when the Paradise was required to bid it was required to bid in the same way as the bidding was going on prior to that time; is that right? “A. Prior to that time?

“Q. Prior to the time that they asked you for 7 day pictures and you required the Paradise to bid.

“A. We required? We didn’t require the Paradise to bid as such, we didn’t make the demands that the Paradise bid. The original request came from the Paradise’s own competition. [2766]

“Q. Well, was the bidding, Mr. Greenberg, that

(Testimony of Fred Greenberg.)

Warners set up as a result of what you have testified to—— “A. Yes.

“Q. ——after the Paradise opened, the same kind of bidding that was going on prior to the time the Paradise opened?

“A. Well, I am just trying to remember when we went into what is called formal bidding, because we didn't enter into formal bidding for—well, anywhere, for that matter, on a formal basis—I think Warners were probably one of the last companies to go into bidding on a formal basis anywhere in the United States, and prior to that time we were negotiating on a bidding or competitive basis.

“Q. When you say prior to that time, what time are you referring to?

“A. I don't know. I would have to look that up, when we started out bidding formally. I don't know just what the date is on that.

“Q. Does the notation on the cut-off card identified as 1-A help you to determine that?

“A. 1-A? You mean this (indicating)? Oh, that means nothing to me.

“Q. No, I mean that notation in the lower [2767] left-hand corner.

“A. Oh, ‘bidding situation?’

“Q. Yes.

“A. Well, it indicates they were bidding, but just when we started formal bidding I would have to check and find out, when our company went into formal bidding as such.”

Mr. Corinblit: Would you go on, please?

(Testimony of Fred Greenberg.)

Mr. Mitchell: More?

Mr. Corinblit: Yes.

Mr. Mitchell: "Q. Do you know what the term 'sham bidding' means, Mr. Greenberg?

"A. 'Sham?'

"Q. Yes.

"A. Never encountered it."

That's all on the matter of bidding. [2768]

* * * * *

Mr. Mitchell: Your Honor, I wish to offer in evidence the comparison of film rental between the pictures *Enforcer*, *Goodby My Fancy* and *Glass Menagerie*, which were developed yesterday during the examination of Mr. Greenberg.

The Court: It may be admitted in evidence.

The Clerk: Warner's J.

(The exhibit referred to was received in evidence and marked as Defendant Warner's Exhibit J.)

Mr. Mitchell: I have no further questions of Mr. Greenberg. [2772]

FRED GREENBERG

the witness on the stand at the time of adjournment, having been heretofore duly sworn, was examined and testified further as follows:

Recross Examination

Q. (By Mr. Corinblit): Mr. Greenberg, yesterday Mr. Mitchell read to you a memorandum, two memoranda, by Mr. Lehman of conversations he had with you in about May 1951. You recall it went something like this:

(Testimony of Fred Greenberg.)

Talked with Fred Greenberg at 10:13 a.m. He informs me we must bid against the La Tijera to secure 7 and 14 day pictures. He says the La Tijera will not permit us to play pictures at either of these clearances without bidding for same and his hands are tied inasmuch as he must cater to their request to permit bidding.

When I asked what happens when the La Tijera loses the bid over the Academy and Fifth Avenue Theatres, and why we cannot negotiate for day and date play with those theatres, he—referring to you—talked in circles and refused to give me anything definite except that we must bid for the product.

Now, it is that phrase in there, when you talked to him you talked in circles, in answer to that question, that I want to develop a little further. [2773]

On the play-off that we have that we will offer in evidence, that is the list of pictures for which bid responses were received, and the Academy, for example, won the first five or six pictures, the La Tijera put in bid responses, you rejected the bid responses of the La Tijera and gave it to the Academy, and then you proceeded to give it to the Southside Theatre by negotiation—

Mr. Mitchell: I object to this as not a question. It is an argument, your Honor. He insists on using the word give. If they offer the most money, he doesn't give it.

Mr. Corinblit: There is no testimony here—

Mr. Mitchell: It is a long argument about matters that occurred—it is not proper cross examina-

(Testimony of Fred Greenberg.)

tion because it doesn't involve the May period at all, 1951. He is talking about back in 1950 when Marco was running the theatre, not when Lehman was running it.

The Court: Read the question.

Mr. Corinblit: Let me rephrase the question.

The Court: All right. Rephrase the question.

Q. (By Mr. Corinblit): Mr. Greenberg, if you could answer this specific question, did you ever tell Mr. Kupper that you felt that since you were violating your contract—let me withdraw that first.

Did you have a contract with the La Tijera for any of these pictures? [2774]

A. I don't remember whether we did or not. I would have to refer again to whatever records there are.

Q. What records do you want to see?

A. Whether or not we had a—our contract from them. I want to see if we had a contract.

Q. With the La Tijera Theatre?

A. With any theatre.

Q. All right.

A. I certainly can't remember any certain specific contract. As you know, I deal with over 400 theatres on a great number of motion pictures, and for you to expect me to answer that question specifically back in 1949 or 1950, or even yesterday, probably is really asking me to tax my memory a bit too much.

Mr. Corinblit: May I have the Warner's contracts that you used with Mr. Greenberg?

(Testimony of Fred Greenberg.)

Mr. Westbrook: Counsel, they are in the exhibit file.

Mr. Mitchell: I did not use any Warner contract. They are bid applications.

Mr. Corinblit: Mr. Mitchell, you put them all in evidence yesterday.

Mr. Mitchell: Then if they are in evidence, they are available to you.

Mr. Westbrook: And there is another file of film [2775] licensing agreements, as you know, that have been here all through the trial.

Mr. Corinblit: You say you have a file of film licensing contracts, is that right, Mr. Bakaly?

Mr. Bakaly: They are in there, yes.

Mr. Corinblit: Will you point them out to me, please?

Q. In addition to the material that you have before you, here is the only file that I find, that your counsel have produced, that refers to the La Tijera Theatre.

A. What pictures did you want to know about, Mr. Corinblit?

Q. What I want to know, Mr. Greenberg, is whether you had a contract with the La Tijera on 006, 008, 007, 010, 019, or 012, or 014.

The Court: You mean a contract as a result of a bid or negotiation?

Mr. Corinblit: Yes, sir, any kind of a contract.

The Court: Any kind of a contract?

Mr. Corinblit: Yes, sir.

The Court: You mean a contract before they got

(Testimony of Fred Greenberg.)

the pictures, I mean months before they got the pictures, or immediately before they got the pictures?

Mr. Corinblit: Your Honor, any contract at all with the La Tijera pertaining to those pictures.

The Court: Any kind of a contract.

Mr. Corinblit: For the 7 day availability.

Mr. Mitchell: Isn't there the evidence that those pictures played at the Academy and Southside?

Mr. Corinblit: Yes, sir.

Mr. Mitchell: What's the use of asking him about the La Tijera. If they didn't play them, they aren't going to have a contract. It is already stipulated what it was.

Mr. Corinblit: Then you will stipulate with me Warners did not have a contract with the La Tijera for those pictures, is that right?

Mr. Mitchell: On any picture that played only in the Academy and the Southside, of course, Warners did not have a contract with the La Tijera or the Fifth Avenue, or any other theatre.

Mr. Corinblit: I will accept that stipulation.

The Court: If you want to stipulate, stipulate as to the pictures. You say all of them. All, of course, includes these pictures, but let's stipulate to what they were.

Mr. Mitchell: Let's get the names of the pictures. I don't carry numbers in my mind. What pictures are you talking about?

Mr. Corinblit: Three Secrets, which you have

(Testimony of Fred Greenberg.)

marked as playing the Academy and Southside, Three Secrets.

Mr. Mitchell: That is back in 1950. [2777]

Mr. Corinblit: Yes.

Mr. Mitchell: All right.

Mr. Corinblit: Rocky Mountain.

Mr. Mitchell: That is back in 1950. That's right. That played the Academy and Southside.

Mr. Corinblit: No contract with the La Tijera.

Mr. Mitchell: Of course, no. You don't have a contract with a theatre that isn't going to play it.

Mr. Corinblit: Glass Menagerie.

Mr. Mitchell: That played in the Academy and Southside. No contract with the La Tijera.

Mr. Corinblit: Breakthrough.

Mr. Mitchell: Still in 1950. Correct.

Mr. Corinblit: West Point Story.

Mr. Mitchell: That's right.

Mr. Corinblit: Highway 301.

Mr. Mitchell: Still 1950. That is correct.

Mr. Corinblit: Storm Warning.

Mr. Mitchell: That is January 1951. That's right.

Mr. Corinblit: All right. That's it.

Q. Now, Mr. Greenberg, it is therefore stipulated there was no contract with the La Tijera for any of those pictures.

Now, did you have a conversation, Mr. Greenberg, with Mr. Kupper or Mr. Johnson of the La Tijera in which you told them that since they didn't have a contract for that picture, [2778] you were

(Testimony of Fred Greenberg.)

going to sell the Paradise Theatre day and date with the Academy, because that is what Warners had a right to do if they wanted to? Did you tell him that? I am just asking about that specific conversation.

A. I don't remember. I don't think that I did.

Q. Now, did you have a conversation with Mr. Kupper in which you told him that—withdraw that.

When Mr. Kupper said to you, as you indicated here, that he insisted on bidding against the La Tijera, he said to you that he insisted on bidding for an exclusive run, didn't he? A. No, sir.

Mr. Mitchell: Mr. Kupper did not say that.

The Witness: He did not use the word exclusive.

Q. (By Mr. Corinblit): He did not use the word exclusive? A. No, sir.

Q. Did he say that he was willing to compete for a day and date run with the Paradise?

A. I thought I made it abundantly clear yesterday that at all times he wanted to have equal opportunity, which was also the method and the offer I had made to the operators of the Paradise, equal opportunity to bid for this picture.

It is strange to me, Mr. Corinblit, that I deal with Mr. Lehman, he buys for about 40 theatres, and many of them are bidding, and some of them have just been concluded. I just [2779] talked to Mr. Lehman this morning, as a matter of fact. I want to develop that with you so you will understand our position in that. He has won these pictures. He is very happy about it. The fellow that

(Testimony of Fred Greenberg.)

loses, naturally, because it is a Warner picture is very unhappy about it. That is exactly the position that I state we had then and we have today.

If an exhibitor insists on bidding against what he considers to be his competition and is willing to put up his money, more of it than the other fellow, I most certainly think that he is entitled to that consideration and shouldn't be—I shouldn't place him in a secondary position just in order to satisfy Mr. Paradise.

Mr. Corinblit: Your Honor, I will move to strike that answer of Mr. Greenberg's as being non-responsive.

The Court: It may go out.

Mr. Corinblit: Thank you.

Q. Mr. Greenberg, I will ask you if you will answer my question, please. A. I will try.

Q. When Mr. Kupper or Mr. Johnson—did you have a conversation with Mr. Kupper and Mr. Johnson in which they made some statement to you that they insisted on bidding against the Paradise?

A. Yes.

Q. When did that conversation take place?

A. Many times. Do you mean what date?

Q. Do you remember the date at all?

A. No, no.

Q. Do you remember who was present at the conversation? A. No.

Q. Do you remember what was said?

A. No.

Q. You don't remember what was said?

(Testimony of Fred Greenberg.)

A. No.

Mr. Mitchell: You mean precisely what was said?

The Witness: He asked me if I remembered what was said.

Q. (By Mr. Corinblit): Do you remember what was said in substance or effect?

A. What I have already indicated, that they wanted to bid or negotiate for our product in opposition to the Paradise Theatre.

Q. All right. Now, did Mr. Kupper and Mr. Johnson say this to you on one occasion or a number of occasions?

A. I wouldn't know how to number the occasions.

Q. All right. Now, did you tell Mr. Johnson or Mr. Kupper on any of those occasions that Warners didn't want to put up a print in that area for an exclusive run?

A. I don't remember that. [2781]

Q. Did you tell Mr. Kupper or Mr. Johnson on any of those occasions that La Tijera didn't have a contract for any of those pictures and that you felt if you wanted to sell the Paradise, you would do it?

A. I don't remember that.

Q. Did you tell Mr. Kupper or Mr. Johnson that you were not setting up exclusive runs as between the Academy and the Southside and, therefore, you would not set up an exclusive run between the Paradise and La Tijera?

A. I don't remember the conversation.

(Testimony of Fred Greenberg.)

Q. Now, in the second letter that Mr. Mitchell read to you yesterday, the second memorandum Mr. Mitchell read to you yesterday——

Mr. Mitchell: I did not read it to the witness. I read that into evidence so that the jury could hear it. I did not read it to him or ask him any questions about it.

Q. (By Mr. Corinblit): In that letter Mr. Mitchell read yesterday, part of it says, "he informed me as far as Lullabye of Broadway is concerned, he was willing to permit us to play the picture day and date with the La Tijera, but that Earl Johnson refused to permit it."

Is that fact correct, Mr. Greenberg, that you were willing, as far as Warners was concerned, it was all right for the Paradise to play day and date with the La Tijera? You can answer that yes or no. [2782]

A. Well, I could say that as far as I was concerned, yes.

Q. Now, were the Paradise and the La Tijera in your opinion in substantial competition in 1950 and 1951?

A. I was led to believe that they were, and I think that they are.

Q. They are in——

A. They were, rather, because the La Tijera, of course, no longer exists today.

Q. They were in substantial competition.

The Court: May I interrupt a moment? Which two theatres is this?

(Testimony of Fred Greenberg.)

Mr. Corinblit: The Paradise and the La Tijera Theatres, your Honor.

The Court: Did you testify yesterday that they were or were not in substantial competition?

The Witness: Were.

The Court: Yesterday?

The Witness: I am quite sure I said they were in substantial competition.

Mr. Corinblit: Your Honor, I don't think the question was asked yesterday, in all fairness.

The Court: It was not asked yesterday?

Mr. Corinblit: No.

The Witness: Your Honor, if I were asked the question [2783] yesterday, I would answer as I did today, that I consider them to be in substantial competition.

The Court: Yesterday you said on numerous occasions you didn't know, and I was wondering if this was one of the occasions you said you didn't know, and you found out overnight.

The Witness: No.

The Court: So it was not asked yesterday.

Mr. Corinblit: No, sir.

The Court: All right.

Q. (By Mr. Corinblit): Mr. Greenberg, this is true, then, it is true not only with respect to the picture Lullabye of Broadway, but true during the period 1950 and 1951 as far as Warners was concerned, it was agreeable for the Paradise and the La Tijera to *play and* date?

A. Under the circumstances that I told you

(Testimony of Fred Greenberg.)

about, as far as I was personally concerned, I would have served day and date, although I wouldn't have considered it to be good business, I would approve something that way, that they couldn't cut up that dollar and either one make a profit, because they would cut into each other, so that neither one would be successful in their operation.

Q. That is to say, you didn't want to permit it for the benefit of the Paradise, is that it?

A. I don't follow that. You mean that I was leagueing or trying to do something against the Paradise? I welcomed [2784] the Paradise into that competitive area, as any other salesman would who has an increase in his possibilities. I certainly could do better with four or five or six or a dozen theatres in a competitive area than if just one existed. It would be a buyer's market then. But having more theatres, we had a seller's market. I am a salesman and I enjoy that position.

Q. Mr. Greenberg, Mr. Mitchell asked you yesterday some questions pertaining to the advisability from a distributor's point of view of selling theatres, a group of theatres, on a formula providing for a percentage to a split figure, and then a percentage over that figure. I think you testified under his examination that if you have a split figure with an increased percentage over that split figure, it is harder for you to get to that overage if you have more theatres playing, is that right?

A. Yes, that's right. I didn't tell him it was de-

(Testimony of Fred Greenberg.)

sirable in our case. In our selling I did not tell him it was desirable, as far as I was concerned, in my selling.

Q. Desirable or undesirable?

A. That's right.

Q. You don't have any opinion on that one way or another? A. I have an opinion.

Q. You have an opinion? [2785] A. Yes.

Q. And your opinion in 1950 and 1951 was what?

A. My opinion at any time is substantially the same, that too often split figures are arbitrarily fixed so that it is most difficult to hit them under any circumstances. I rarely sell with split figures and I try to get away from what was termed a sliding scale, because a sliding scale is developed by the exhibitor himself, and under the circumstances you naturally would suppose him to take advantage of everything that is possible for him under those circumstances. You accept a sliding scale which is something that he himself has developed.

Q. So you don't like sliding scale?

A. Not too well.

Q. And you don't like percentage to a split figure with a top figure?

A. I like it if the split figure is reasonable. I am talking about this business from a practical point of view as we meet it from day to day.

Mr. Corinblit: All right. May I have the Warner cut-off cards, please?

Q. I will show you Plaintiff's Exhibit 72-C and

(Testimony of Fred Greenberg.)

ask you to run down the United Artists cut-off card for the 7 day availability in 1950 and 1951.

A. Yes. [2786]

Q. At that time, as far as the 7 day availability was concerned on that cut-off card, there are nine entries for pictures. Of those, how many do you find on a sliding scale?

A. I see one. That's all I see.

Q. Do you find any on a split figure basis?

A. No. I see them with guarantee.

Q. Guarantee and straight percentage and flat?

A. That's right.

Q. No split figures?

A. I don't see any split figures on this one.

Q. On the La Tijera, I count 14 entries. Will you tell me if you find any sliding scales?

A. I see one, that's all.

Q. Do you find any split figures?

A. No, I don't. That bears out what I told you.

Q. On the Imperial Theatre, I count 18 entries. Do you find any sliding scales? A. No, I don't.

Q. Do you find any split figures? A. None.

Q. On the Paradise, I see—well, this is not on a 7 day run. A. What is that on?

Q. It is called third run. Perhaps we better handle [2787] this matter, even though it is not on the 7 day. I see 11 entries.

Mr. Mitchell: What run is this?

The Witness: Well, it is—

Q. (By Mr. Corinblit): What is it called?

A. Third run there, but then on this one here,

(Testimony of Fred Greenberg.)

while it said third run, which was established——

Q. Tea For Two.

A. Some of these pictures are not third run.

Q. Yes.

A. Some of these pictures are first run in the area. [2788]

Mr. Corinblit: Yes, I don't have any quarrel with that. As a matter of fact, I didn't think we ought to handle the Paradise because it doesn't refer only to 7 days pictures, but it might be important to state—just to get the record clear that there are no sliding scales or split figures on the Paradise card.

Mr. Mitchell: I object to it as being immaterial on these later runs. That isn't the way they sell pictures on the later runs. It is not material to the 7 day problem at all.

The Court: Objection overruled.

Q. (By Mr. Corinblit): Are there any, sir, any split figures? A. No, not on that page.

Q. And no sliding scales on that page?

A. No, sir.

Q. Now, we turn to the Fox Academy or Fifth Avenue. I count 14 entries. Will you tell me how many sliding scales? A. I see one.

Mr. Mitchell: The records are in evidence, your Honor. Can't—this is just a matter of arguing from the record.

The Court: Objection overruled.

The Witness: I see one re-issue combination on sliding scale. I see one that had a split figure—two

(Testimony of Fred Greenberg.)

—let me [2789] see, three that have a split figure. I believe that is all.

Q. (By Mr. Corinblit): And the rest are either straight percentage or flat? A. That is right.

Q. On the Rio Theatre where the cut-off card indicates—first, there are nothing but flat figures, is that right?

A. That is right. Just flat figures. No, wait a minute—that is wrong. Here is a percentage.

Q. Pardon me. One percentage, but no sliding scale and no split figures?

A. That is right. I don't like them.

Q. And finally the Southside card? A. Yes.

Q. I count 19 entries. Are there any sliding scales? A. No, no sliding scales.

Q. And no split figures?

A. No split figures.

Mr. Corinblit: No further questions.

Mr. Mitchell: May Mr. Greenberg be excused, your Honor?

The Court: May this witness be excused?

Mr. Corinblit: He may be excused.

The Witness: Thank you, sir.

Mr. Mitchell: I will call Mr. Blake. [2790]

FOSTER M. BLAKE

called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

The Clerk: State your full name.

The Witness: Foster M. Blake.

Direct Examination

Q. (By Mr. Mitchell): Mr. Blake, what is your occupation?

A. I am Western Division Sales Manager for Universal Pictures.

Q. How long have you occupied that position?

A. Since January, 1950.

Q. And what was your position before that?

A. I was district manager for Universal with headquarters here in Los Angeles and included under my supervision was the Los Angeles territory.

Q. Let us start back with your association with Universal. When was your first association with Universal?

A. 1938 as a salesman in the Portland, Oregon territory.

Q. All right. Where did you go from there?

A. In 1939 I became salesman in the Los Angeles territory. In 1941 I became branch manager of our Seattle office and in 1947 returned to Los Angeles as branch manager here.

And in 1946 I became district manager. [2791]

Q. And then you have been district manager since 1946? A. Division manager since 1950.

(Testimony of Foster M. Blake.)

Q. What does the district manager encompass?

A. Well, in my case my district comprised the Los Angeles, Salt Lake, Denver, Kansas City, Omaha and Des Moines branches as division manager. I now have supervision over 13 branches from Chicago and Indianapolis west.

Q. During this period did you for some time reside in Los Angeles? A. Yes, sir.

Q. And during what part of this period?

A. 1939 to early 1941 and again from early 1943 to the end of 1949.

Q. Now, you are familiar with the manner in which Universal licensed its first run pictures from 1946 forward, Mr. Blake?

A. I believe I am, yes, sir.

Q. In Los Angeles, I mean? A. Yes, sir.

Q. The record shows that you started licensing your pictures in 1946 first run Los Angeles to a group of Fox West Coast theatres.

What was the occasion of adopting that method of licensing your pictures?

Mr. Corinblit: I object to that unless a foundation is [2792] laid with respect to this witness' knowledge or conversations having to do with the determination of policy as to that matter.

My information is that such a foundation—I request such a foundation be laid in the light of this witness'——

The Court: All right, lay a foundation.

Q. (By Mr. Mitchell): Well, you were branch manager in 1946?

(Testimony of Foster M. Blake.)

A. I became, yes, early part of 1946 I was branch manager and on September 1st of that year I became district manager.

Q. And were you present at a discussion between Mr. Zabel and Fox West Coast people with respect to the arrangement for a group of theatres to play Universal pictures first run Los Angeles?

A. I was present at some of those discussions. I am not certain that I attended all of them.

Q. And did you participate in discussions with your own Universal management people about this?

A. Yes, I did.

Q. All right. Now, tell us what the occasion was of Universal making an arrangement with Fox West Coast for the licensing of pictures first run Los Angeles?

Mr. Corinblit: The same objection. No foundation has been laid. The foundation only says that he participated [2793] in discussions.

Now, the foundation with respect to his knowledge as to what the conversation was is a long way from participation and discussion.

The Court: Haven't we already got evidence in the record as to what happened here?

Mr. Mitchell: Certainly. I don't know what Mr. Corinblit is objecting to.

The Court: This is cumulative only.

Mr. Corinblit: Yes.

The Court: Objection overruled.

The Witness: May I hear the question again, please.

(Testimony of Foster M. Blake.)

The Court: Read the question, Mr. Reporter.

(Question read as follows: "Q. All right. Now, tell us what the occasion was of Universal making an arrangement with Fox West Coast for the licensing of pictures first run Los Angeles.")

The Witness: The occasion was the fact that the theatre business was quite good in this area by 1946 and had been for several years previous. As a result pictures were playing much longer—extended runs were the rule rather than the exception, and as a result we were having a great deal of trouble finding playing time.

We were having trouble in finding theatres in which to play first run Los Angeles on the 50 to 55 pictures that we [2794] released every year at that time.

We had as far back as my knowledge goes, been playing first run Los Angeles in the RKO theatres, the Pantages on Hollywood Boulevard and Hill Street Downtown.

Ours were not the only pictures played by RKO theatres. I believe they generally played two other products.

As a result of these lengthened runs, we met with increasing difficulty of getting playing time in the RKO theatres, so for the year or possibly two years prior to the fall of 1946 we were literally and figuratively in the street with our pictures. We had a very difficult time finding a regular consistent outlet first run.

(Testimony of Foster M. Blake.)

We did find places to play our pictures at that time and what we considered acceptable for the better available first run theatres.

We might be playing our pictures in such a manner that we found ourselves competing with our own products, not only on first run, but in the subsequent run availabilities.

So, we decided we would like to try to find a reliable and definite outlet for our pictures in the way of a group of theatres that would replace capacities—the Hill Street and Pantages Theatres—we did what—pardon me. After surveying the situation, and after all we lived with it day in and day out—we knew which theatres seemed to be pretty well tied up with certain pictures, certain products, but we [2795] did the obvious thing. We went to the theatre operators who had the most of what we wanted, and that happened to be Fox.

We asked them to try to make available to us a group of theatres that would permit us to offset or equal the approximately 6000 seats that we had in—that we had had in the Hill Street and Pantages.

That was the occasion.

Q. (By Mr. Mitchell): At that time, what was the quality of your pictures compared with, let us say, Loew's, Warners, Paramount, Fox?

Mr. Corinblit: I object to that question unless a foundation is laid with respect to this witness' knowledge of the quality of the pictures of other companies.

(Testimony of Foster M. Blake.)

The Court: Do you think that is a fair question to ask this witness?

Mr. Mitchell: I know it is an embarrassing question, but I think he should answer it.

The Court: MGM have already testified that they had the best pictures in the world.

Mr. Mitchell: But I think it is a factor that confronted Universal and I must ask him to answer the question however embarrassing.

The Court: Well, let us get a definition of the meaning of the word "quality." [2796]

Q. (By Mr. Mitchell): Well, box office-wise in comparison to these other companies.

Mr. Corinblit: Your Honor, I know your Honor wants to rule on the objection, but the point I made as to this witness' knowledge of the box office quality of Metro, Warner, Paramount is not his own——

The Court: Don't you think a man in the motion picture industry engaged in the distribution of pictures watches his competitors as well as his own pictures?

Mr. Corinblit: Yes, but if we could just have this witness state that he knows the box office quality of the other theatres, then on cross examination I wouldn't have that problem. I object to it on the ground that no foundation has been laid.

The Court: Overruled. Answer the question if you can.

The Witness: It is an embarrassing question, your Honor, since I am under oath.

You have to be realistic. You may not go around

(Testimony of Foster M. Blake.)

publicly admitting that your pictures are not as great as your competitors, but I think we in the sales department are fairly honest with ourselves in the appraisal of our product and we know our competitors' position.

To answer specifically how we felt about our pictures, we were making a great volume of product. We were not as you may say, leading the parade by any means with respect to [2797] quality.

We had an occasional picture where we could sit back and enjoy what we would call a "seller's market," but generally we were at a disadvantage.

Q. (By Mr. Mitchell): All right. Now, with this problem of the type of pictures you were distributing and your inability to get them properly exhibited and exploited, what did you do then?

A. At what time?

Q. In 1946.

A. I am sorry. I don't understand the question.

Q. Well, did you have a conversation with a theatre owner in an attempt to get him to play your product? A. Prior to 1946?

Q. No, in 1946. I am referring particularly to Mr. Zabel.

Mr. Corinblit: Your Honor, these are leading questions. I know leading questions have been asked before, but this is now putting the name of the witness—the name of the person in the conversation right into the witness' mouth.

The Court: Objection overruled.

(Testimony of Foster M. Blake.)

The Witness: These discussions concerning the formation of what we came to refer to as the "Universal unit," naturally included Mr. Zabel.

Mr. Zabel was the head of the buying department of Fox [2798] West Coast Theatres or National Theatres generally at that time, so it was perfectly logical he was one of the people that we talked to.

Q. (By Mr. Mitchell): Now, can you remember a conversation in which some request was made by Universal for theatres? A. Yes, I can.

Q. And where was the conversation?

A. I am quite certain it was in Mr. Zabel's office.

Q. And do you remember who else were present?

A. Mr. Scully, who was then our general sales manager and I believe Mr. O'Keefe, who was then assistant general sales manager of Universal.

And I believe also that Mr. Feldman, who was then district manager, was present.

Q. And who else besides Mr. Zabel for Fox West Coast, if you remember?

A. I don't recollect exactly, but I can assure you that there were others of the Fox organization there because they always came in bunches.

Q. All right. On your side, can you remember what was said and by whom in substance?

A. I can't remember anything exact. We discussed the relative values of the different theatres that had been proposed as a part of this unit. [2799]

Q. Well, did anybody—how did it start?

A. The inception was, as I understand it—I

(Testimony of Foster M. Blake.)

don't know that I was in that original conversation——

Mr. Corinblit: Then, your Honor, I will ask the witness not to testify to anything he doesn't know of his own knowledge.

Q. (By Mr. Mitchell): In the conversations that you remember?

A. The conversations I am speaking of, Mr. Mitchell, are those we had among ourselves, among the Universal people when we were discussing the request that we went to Fox with, asking them to furnish us a group of theatres.

They had more to offer than any one person. We hoped, as I said before, of putting together approximately six thousand seats.

Q. Now, this discussion that you remember in Mr. Zabel's office, what was the substance of that discussion?

A. That was as I believe I said before, merely discussing the relative values of the different theatres, such as the Ritz on Hollywood Boulevard, or the United Artists downtown, or some of the Fox theatres on Hollywood Boulevard.

Q. All right. And did you finally arrive at a group of theatres which they would make available to you?

A. We did. We weren't entirely satisfied, but we got what we felt was certainly some of the better available [2800] theatres in the area and we did achieve our aim of assembling approximately six thousand seats. [2801]

(Testimony of Foster M. Blake.)

Q. And what were those theatres that you started with? A. The United Artist.

Q. Downtown Los Angeles?

A. Downtown Los Angeles. The Ritz on Hollywood Boulevard, the Iris and the Guild on Hollywood Boulevard and the Studio City on Ventura Boulevard.

Q. And those made up approximately the number of seats you were looking for? A. Yes, sir.

Q. How did you happen to select the Studio?

A. Well, that goes back to the Hollywood Boulevard situation. It wasn't entirely a choice that we took two theatres on Hollywood Boulevard, but in order to make up the seats that we felt were required to offset a large theatre like the Pantages, which we felt was just about the finest Hollywood outlet obtainable, we had to take two theatres on Hollywood Boulevard.

Then there was the thought that I believe emanated, I am quite certain, from some of our people in the publicity department of the studio that they would like to have a first-run theatre in their back yard.

There is a place out there called Universal City. It is a separate post office. It is something that Universal is rather—I shouldn't say "proud of," but at least it has been jealously guarded for many years. [2802]

Q. And that is on Lankershim Boulevard?

A. Yes, sir. And we felt certainly as we were not overseated on Hollywood Boulevard it wouldn't

(Testimony of Foster M. Blake.)

harm us too much to have a theatre that people in our studio, most of whom I understood at the time lived in the Valley and North Hollywood, would have a theatre in their own backyard, as it were, playing Universal product first run.

Q. All right. Now, what was your arrangement with Fox West Coast with respect to these theatres and in respect of how you would get your pictures in there and at what price and so on?

Mr. Corinblit: Your Honor, I object to this as calling for a conclusion of the witness. Can't we have testimony as to conversations and as to what was said or any written contracts arrived at?

The Court: Objection overruled.

The Witness: We were given—in fact, it was part of our original request, prior rights to this unit—by that I mean we actually booked and within reason we determined the length of the runs of our pictures. We couldn't be unreasonable and insist that a picture play so long that it forced the theatre into a loss just to get us a few days' additional playing time for an additional few dollars in film rental, but with rare exceptions only Universal pictures played in this unit, unless there could have been a time [2803] where we didn't have a picture available to play in the unit.

But we really exercised the booking control of this unit of theatres.

Q. (By Mr. Mitchell): How did you determine the price that would be paid for each of these pictures that you put in?

(Testimony of Foster M. Blake.)

A. It was a matter of constant and continuing discussion with the Fox buying department, although after the fact it is evident that we played our pictures in the majority of instances on a sliding scale basis.

Q. In your arrangement with Fox West Coast was there any length of time in which you were to continue this practice?

A. There was no commitment on our part to deliver pictures for any specific time. We could have stopped any time we wanted to. The arrangement had to be mutual, of course, and for a number of years we felt it was the most satisfactory way of playing our pictures first run Los Angeles.

Q. All right. Now, during the time that you used this unit of theatres as your first-run outlet, were there some changes made in the theatres that Fox West Coast made available to you?

A. Yes, there were several changes at our insistence, or perhaps I should say because of our dissatisfaction with [2804] playing two theatres on Hollywood Boulevard.

We finally induced Fox to give us or make available to us the Vogue Theatre instead of the Iris and the Guild.

And at one time on at least one picture, I remember, the Carthay Circle was added to the unit. It happened to be a rather important picture, and we felt that the business it would do would justify the addition of another theatre.

Sometime during this period, and I do not recol-

(Testimony of Foster M. Blake.)

lect whether it was '48 or '47, the Culver Theatre was added and for the most part played there on out, but, generally speaking, it was five theatres.

Q. All right. Now, by 1950 what was your job at Universal?

A. From January 1, 1950 I moved to New York to assume the duties of Western Division sales manager.

Q. Did you give any attention to the matter of this first-run situation for Universal pictures in Los Angeles? A. Yes, I did.

Q. And what attention did you give to it and what did you do?

A. Well, I was constantly watching—I was constantly discussing any changed circumstances or conditions that might have arisen with the local branch manager or our then district manager supervising this territory.

I probably was the first one of our people to express [2805] a growing dissatisfaction with what we had been doing in playing this first-run unit from 1946 up until then. Business had declined materially——

Q. You mean business generally?

A. Yes, theatre grosses generally.

Q. You mean in this unit or generally?

A. We found it declined with relation to our pictures. That is all we know. We found that they declined in this territory. That is all that concerned us, and we found that carrying these five theatres, and by "carrying" I mean the theatres had to pay

(Testimony of Foster M. Blake.)

their overhead and our film rental earning was directly or indirectly dependent upon those overheads as well as the grosses, and it was at that time that we began thinking in terms of some other arrangement that we could work out for first run Los Angeles. [2806]

Q. In what direction did you think you would go, did you consider going?

A. Reducing the number of first run theatres.

Q. When did this sort of discussion start at Universal?

A. These discussions started in 1950 and came to a conclusion in the early summer of 1951. There was a great deal of study, discussion, and what you might call research involved over a period of many months between and among our people here, and involving myself.

Q. So that during this period when the Paradise was asking a first run, you were thinking of decreasing the number of Universal first runs?

A. That is correct.

Q. All right. Now, did you finally do something about this dissatisfaction that you had with so many first runs?

A. We did, but, of course, when we did that, we did a complete job and revised our entire pattern of distribution in what we call the greater Los Angeles area.

Q. What did you do?

A. We put this into effect in about, I believe, September of 1951.

(Testimony of Foster M. Blake.)

Q. What did you do?

A. We reduced our so-called first runs to three theatres. We offered our product to anyone having theatres in the central downtown area for one run, or to one run on Wilshire [2807] Boulevard, not including Beverly Hills, and one run on Hollywood Boulevard. Three at what we call show case runs.

And then after that we branched out into a pattern of subsequent run and outlying town play-off.

Q. How long did you continue that method of distribution?

A. We continued that until about late in 1953, I believe it was, but my answer has to be qualified because we still play pictures that way in some instances now. In fact, we play in first run, three first run theatres at some times, and again since 1953, we may play in as high as nine or ten first run theatres. We have a varied plan or pattern of distribution and first run play-off now, which is controlled to a great extent by the nature of the picture.

Q. Well, since 1952, just describe generally what you have been doing so that the jury can understand how you have been licensing since that date.

A. Generally since then we have been trying to first put together the three theatres in the three show case areas that I defined a moment ago, and then add to that, supplement those three theatres with six or seven theatres, whether they be drive-ins or otherwise, in the entire greater Los Angeles area.

Q. On what type pictures?

(Testimony of Foster M. Blake.)

A. Our type of pictures. [2808]

Q. What do you do with your better pictures?

A. Well, in some cases we try to have a single theatre run.

May I set an example of pictures such as Magnificent Obsession. We played that in one theatre for, I believe it was seven or eight weeks, the Warner Beverly.

On the other hand, one of the most important pictures we have had in recent years was a picture called To Hell And Back, but a different type of important picture. We felt that that best lent itself to the multiple run play-off, and consequently I believe we played first run on To Hell And Back in, I believe, 10 theatres, nine or ten.

Q. What was your reason for going to this multiple run play-off on at least some of your pictures?

A. Well, like everything else, it was a matter of changing circumstances and changing conditions. We were finding that after we were coming off of the three show case runs, that the better subsequent run playing time in the so-called 7 day towns, we call it the first swing, was not available to us because these better outlying theatres were finding themselves able to obtain first run product.

Q. Of other companies? A. Yes.

Q. In other words, somebody got there before we did and the playing time was gone, and we had to go into secondary [2809] theatres. In some cases we had to forego runs in some areas where

(Testimony of Foster M. Blake.)

a great deal of film rental should have accrued to us.

So we thought the only thing we could do would be to make our pictures available first run in a wider sense and in a wider area.

We were finding that an important theatre in one of the outlying Los Angeles areas would rather play a relatively lesser picture first run than a somewhat better picture subsequent run.

It is all picture by picture, and what we do depends a great deal on the individual picture we happen to be selling at that particular moment, the type of picture, its grossing potential.

Q. Were theatre conditions generally after 1953 any different than they were in 1950 and 1951?

A. Theatre grosses were declining, or at least we were having increasing difficulty in maintaining our grosses.

Q. This selling of your product in the Los Angeles metropolitan area, these various methods that you adopted for these many years, were those done as a result of any arrangement or understanding or conspiracy or combination or agreement with Warners or Paramount or Loew's or Twentieth Century-Fox?

A. Absolutely not. In fact, this overall revised pattern of distribution that we were instituting in September [2810] 1951, which I testified was discussed among ourselves for many, many months prior to that time, was a big secret. We were only discussing it with ourselves. We certainly weren't

(Testimony of Foster M. Blake.)

asking for advice or consulting with anyone else, either other distributors or certainly not theatre people, until we got ready to announce the plan, and it turned out that we were the only company at that time that had made such an announcement of a general overall pattern of distribution, which we considered would be fair to all and give us the best possible return.

Q. How about this arrangement that you made with Fox West Coast? Was that the result of any understanding, deal, combination, conspiracy or agreement with anyone else other than Fox West Coast, particularly with Twentieth Century-Fox or Paramount, Loew's, or Warners?

A. Absolutely not.

Mr. Mitchell: That's all, your Honor.

The Court: Ladies and gentlemen of the jury, we are about to take another recess. Again it is my duty to admonish you you are not to discuss this case with anyone, you are not to allow anyone to discuss it with you, and you are not to formulate or express any opinion as to the rights of the parties until this case has been finally submitted to you.

With that admonition, court will now stand in recess until 11:15. [2811]

(Recess.)

The Court: Stipulate the jury is present in the box?

Mr. Corinblit: So stipulated, your Honor.

Mr. Mitchell: Yes.

(Testimony of Foster M. Blake.)

The Court: Mr. Johnston, do you have any questions?

Mr. Johnston: No, your Honor.

The Court: Cross examine.

Mr. Corinblit: Thank you.

Mr. Johnston: At least not at the moment.

Cross Examination

Q. (By Mr. Corinbilt): Mr. Blake, I *testified* you testified that you were in Los Angeles from 1946 to 1949, is that right? A. Yes, sir.

Q. Located here as branch manager?

A. As district manager during that period.

Q. And then you became—in 1949 you went to New York? A. The end of 1949.

Q. Still as district manager?

A. No, as division manager.

Q. Western division?

A. Western sales manager, yes.

Q. You stayed in New York through 1951, or you are still [2812] there in this capacity as western division manager, is that right?

A. The same, yes.

Q. The same position. Now, you testified that there were some conversations that you participated in with Mr. Zabel and Mr. Scully. Were you in on the very first conversations?

A. I doubt if I was.

Q. This was not your idea, was it, this unit idea? A. A theatre unit, no, it was not.

Q. It was someone else's idea, I take it, an idea

(Testimony of Foster M. Blake.)

that came from somebody further up in the echelon, and not further down? A. That's right.

Q. The president of your company was Mr. Blumberg at that time? A. Yes.

Q. You know, of course, that he and Mr. Skouras are the people who initially discussed this matter, don't you? A. I know no such thing.

Q. You don't?

A. No. I did not know it, I never did know it.

Q. You don't know Mr. Skouras, Mr. Blumberg and Mr. Pantages discussed this matter prior to any of your discussions?

A. I certainly do not. [2813]

Q. But, on the other hand, you weren't there the first time and so you don't know who discussed it the first time, do you, in fact?

A. I think I know who conceived this idea. After all, I was in a lot of discussions with my own people about this unit.

Q. You are certainly not testifying that Mr. Blumberg did not participate in the decision?

A. No, I can't.

Q. He did participate in the decision?

A. I don't know that he did.

Q. You don't know that he did?

A. No, sir. My only knowledge of Mr. Blumberg's being involved in this matter was when he was told what we had done, and he expressed pleasure with the outlook of having a consistent home for Universal pictures.

(Testimony of Foster M. Blake.)

Q. But you don't remember that he was regularly consulted about your negotiations?

A. I don't remember it because I don't know it to be a fact. He may have been informed. The president of the company is entitled to that, of course.

Q. Did you tell Fox West Coast what theatres you wanted in that unit, or did they tell you what theatres they would make available?

A. I am sorry. I didn't hear. [2814]

Q. Did you tell Fox West Coast what theatres you wanted in the unit, or did Fox say to Universal, "These are the theatres that we will give you"?

A. We went to Fox and told them where we wanted theatres, the approximate area, and they in turn offered us certain theatres of their choice.

Q. All right. Let's get these areas defined. You went to Fox and you told them——

Mr. Corinblit: Mr. Murphy, I wonder if we could take this map down from here. That's fine. Thank you.

Q. You went to Fox and you told them you wanted a theatre, one of the places you wanted a theatre was Culver City, is that it?

A. No, we did not.

Q. You did not tell them you wanted a theatre in Culver City?

A. You are speaking of the period immediately prior to 1946 when we put together this unit?

Q. Yes.

A. The Culver City was not involved at that time.

(Testimony of Foster M. Blake.)

Q. So that you didn't tell them at that time you wanted the Culver City area? A. No.

Q. What areas did you tell Fox you wanted your theatres in? [2815]

A. Primarily downtown and Hollywood Boulevard, which is what we had had in the Pantages and Hillstreet.

Q. In addition to the primarily, what other areas?

A. We couldn't assemble the number of seats in downtown and Hollywood Boulevard to give us a chance to offset and equal the RKO theatres, so then we considered going on to Wilshire Boulevard, and the Ritz or the El Rey Theatres were offered and we chose the Ritz.

Q. You chose the Ritz?

A. I explained in answer to Mr. Mitchell's question a while ago why, how and why we went into the North Hollywood or Studio City area.

Q. Mr. Blake, did you tell Fox in 1946 that you wanted to go in Studio City? A. Yes, sir.

Q. You did, and you told them you wanted to go on Wilshire Boulevard and you told them you wanted to go downtown? A. Yes, sir.

Q. And told them you wanted to go on Hollywood Boulevard? A. Yes, sir.

Q. Did you go to any other theatre owners and ask them whether they had a theatre in Studio City, for example, that they would like to play Universal pictures in? A. No. [2816]

Q. You did not? A. No.

(Testimony of Foster M. Blake.)

Q. Of course, you didn't go to any theatre on Wilshire Boulevard and do that, because there weren't any other theatres other than Fox on Wilshire Boulevard, were there?

A. Could be, but I don't think it would have made any great difference.

Q. That is, you still would have gone to Fox?

A. We went to the people that had the most of what we wanted. I think that was a very logical thing to do. That was our best judgment at that time.

Q. Without regard to logic, Mr. Blake, this is just a simple question. The fact is that on Wilshire Boulevard Fox was the only company that you could go to, isn't that right?

A. I am trying to remember the conditions that existed in 1946. I guess the same theatres under more or less the same operation were in existence at that time, so Fox were the only ones who had any theatres to offer us on Wilshire Boulevard, I believe.

Q. All right. Now, on Hollywood Boulevard, you went to Fox, I take it. Did you discuss getting into any theatres other than the theatres you have mentioned on Hollywood Boulevard, that is, did you discuss at that time with your superiors whether it was possible to find any other theatre [2817] on Hollywood Boulevard in which you could license your pictures?

A. I don't know whether we discussed it with Fox. We were pretty much aware of what was go-

(Testimony of Foster M. Blake.)

ing on and we knew that we would probably have to find theatres that were not already pretty well occupied with other product.

Q. What did you know about the situation on Hollywood Boulevard in 1946?

A. We knew that the Warner Hollywood was almost exclusively, if not absolutely exclusively, playing Warner pictures.

We knew that the Hollywood Paramount was playing principally Paramount pictures.

We certainly knew the condition at the Pantages Theatre, which was part of the reason for what we were doing, that they played RKO and Columbia product to the point where there was very little playing time for anyone else. [2818]

There was a theatre from the lower end of Hollywood Boulevard called the Hawaiian Theatre. That was a part of a unit of theatres playing almost entirely United Artists product. So again on Hollywood Boulevard it looked like Fox or no one.

Q. How about downtown? What did you know about the situation downtown?

A. A similar condition existed in relation to Warner's downtown and downtown Paramount and the RKO Hill Street, the Los Angeles Theatre and the Loew's State Theatre.

Q. What was the situation re the Los Angeles Theatre? A. The Los Angeles Theatre?

Q. Yes.

A. I believe at that time it was part of a unit that included the Chinese. At least it was a unit

(Testimony of Foster M. Blake.)

that was playing almost exclusively Twentieth Century-Fox pictures.

Q. Los Angeles was?

A. The Los Angeles Theatre.

Q. How about the Loew's State?

A. The Loew's State Theatre, I believe, was playing MGM almost exclusively.

Q. Well, just so the record isn't confused, Mr. Blake, it might refresh your recollection by saying it was just the other way around.

A. Was it? It could very well have been. [2819]

Q. The Los Angeles was playing Metro product and Loew's State the other.

A. Thank you.

Q. Now, after you—let us talk about 1946. Did Warner's ever come to Universal and say, "We would like to play Universal product," in 1946?

A. Prior to 1946 or prior to the inception of this unit?

Q. Prior or after. A. I don't believe so.

Q. Did the Paramount Theatre ever come to Universal and say they wanted to play your product?

Mr. Mitchell: The Paramount didn't do it. If it was done it must have been Fanchon and Marco who was running the Paramount.

Q. (By Mr. Corinblit): Anyone representing the Paramount. A. No.

Q. Now, before 1946 there had been an independent theatre knocking at your door for many

(Testimony of Foster M. Blake.)

years, hadn't there, trying to get first-run pictures—the Hawaiian Theatre?

A. But at that time when we decided to try to obtain a unit of our own the Hawaiian Theatre was part of a very definite group of theatres, a United Artists Theatre.

Q. Without regard to that time, but at a prior time, there had been an independent theatre on Hollywood Boulevard [2820] which had regularly tried to get your pictures for first run and you refused because you wouldn't sell them to an independent, isn't that right? A. No.

Mr. Mitchell: That is immaterial. It is prior to the time here.

The Court: Overruled.

The Witness: The Hawaiian Theatre did play some of our pictures. After all, this condition in the Pantages and Hill Street Theatres didn't happen overnight. It was a gradual process.

I believe I testified a while ago that for a considerable period, maybe a year and a half or so, we were literally in the street with our pictures. We were selling them wherever we could. We sold a great many of our pictures to the Hawaiian Theatre. We didn't refuse them, but I believe it was in 1945 that the Hawaiian Theatre became a thing—a part of the thing we are talking about—they became a part of a unit playing United Artists.

Q. (By Mr. Corinblit): You are not testifying that you went to the Hawaiian Theatre in 1945 and asked them to play your pictures regularly?

(Testimony of Foster M. Blake.)

A. No, I am not, because we weren't asking anyone in 1945.

Q. Mr. Blake, I want to show you an exhibit that has [2821] been admitted in evidence. It is Exhibit 46-A-16, which is the Universal playoff for 1945.

I call your attention to the first page thereof which includes some two, four, six, eight, ten, twelve, fourteen, sixteen pictures on the first page running from January '45 to May of 1945.

Now, during that period how many pictures did you play in the—how many pictures did you play in any theatre other than Fox Theatres or RKO Theatres? A. On the first page?

Q. Yes.

A. I presume you are considering the Four Star Theatre a Fox Theatre?

Q. It was a Fox Theatre at that time, was it not? A. I believe it was.

Q. All right. How many?

A. There are two pictures that played in the Hawaiian Theatre.

Q. And what are the names?

A. See My Lawyer and Night Club Girl.

Q. And they were on the same bill, is that right?

A. Double bill.

Q. Would you describe those two pictures as turkeys or dogs?

A. What is the difference? [2822]

Q. All right. That is, they are one or the other.

A. I don't recall the relative quality of them. I

(Testimony of Foster M. Blake.)

know they weren't tremendous smash hits or anything like that.

Q. All right. So it is true, is it not, that during this period prior to May of 1945 that Universal played, certainly all of its top pictures, in either RKO houses or Fox houses when you said you were on the street?

A. Mr. Corinblit, if you will look further on that list you will see that the Hill Street and Pantages played them and the Loew's—I mean the Chinese Theatre played in some unit.

Are you comparing the Hawaiian Theatre as a potential outlet with the Hill Street or the Pantages?

Q. Mr. Blake, my question to you was only this: Whether it is not a fact that during that period all of the suitable first-run pictures that Universal had went either to RKO or Fox.

A. On that date, yes.

Q. And you know during that period that the Hawaiian Theatre was not connected with any unit whatsoever, don't you?

A. I didn't notice the date of that period you are speaking of.

Q. All right. I will show you Plaintiff's Exhibit 46-A-15, which is a playoff of United Artist [2823] pictures and call your attention to the picture G. I. Joe which opened at the Hawaiian August 8, 1945. Does that refresh your recollection that prior to August 1945 the Hawaiian Theatre, an independent theatre, was free of any connection with any unit?

(Testimony of Foster M. Blake.)

A. I recollect G. I. Joe was the first picture in the United Artists unit, but I don't remember the date of the other picture you were questioning me about.

Q. I will show that to you again so we can get it clear.

It is a group of pictures that you testified to that ran from January to May of 1945 and prior to any connection of United Artists with a unit, is that right? A. Yes.

Q. Now, let us take it over until August 1945 which gives us another one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve pictures.

A. Yes.

Q. Now, of that group of 12 pictures how many pictures played in any other theatre than a Fox theatre or an RKO theatre?

Mr. Mitchell: I think this is argumentative. The exhibit is there, if he wants to deal with it fairly. They most all played in the RKO, I believe. I haven't looked at it, but that is what their policy was, and when you say "or Fox" you are making it appear as though he is playing somewhere other than RKO. [2824]

To amount to anything I think the exhibit itself can be read to the jury. That is all he is doing. He is heading from an exhibit, and it is argumentative.

* * * * *

The Court: Well, maybe the witness can testify from his own independent recollection.

(Testimony of Foster M. Blake.)

Q. (By Mr. Corinblit): Can you testify from your own recollection, Mr. Blake, on that? [2825]

A. Only generally speaking that we played some pictures in the Hawaiian Theatre prior to the time it became a part of the United Artists. As to the quantity I couldn't tell you without referring to the record. [2826]

* * * * *

Mr. Corinblit: Incidentally, Mr. Blake, *Imitation of Life* and *East Side of Heaven* were reissues, weren't they? A. That is correct.

Q. That is, they had been made at some prior time and were now being reissued?

A. That is right.

Q. And those are all the pictures prior to August 1945.

Now, what you were doing just before the time you went to Fox, Mr. Blake, was splitting your product between Fox and RKO, isn't that right?

A. We were not splitting it. We still had our basic commitment and desire to play the RKO theatres.

The product that RKO couldn't absorb we tried to sell in the best theatres that we could find other than the RKO house.

Q. And the only theatres you could find were Fox houses?

A. Fox had an awful lot of theatres here. Isn't [2828] it logical we would find Fox houses?

Q. You couldn't find an independent house?

(Testimony of Foster M. Blake.)

A. What independent houses were there outside of the Hawaiian?

Q. That is a good question, Mr. Blake. Now, when you had this discussion with Mr. Zabel and Mr. Scully you didn't do much talking at those conversations, did you?

A. I don't recollect. I think I was slightly out-ranked and I would let someone else do the talking.

Q. Your superiors were there at the time.

Now, I think you testified that after—that is, as far as the terms were concerned, you used to negotiate real hard with Fox on terms, is that right, picture by picture as they came out, is that right?

A. That isn't what I said.

Q. You didn't say that? A. No.

Q. I am sorry. Will you tell us what was the fact about negotiations for terms after you went into the unit?

A. The negotiations fell into a pattern somewhat similar to the manner in which we played many other Fox first run theatres, namely the sliding scale, which as such is not a bad way to play pictures, of course, and that depends on the nature of the scale itself. [2829]

Q. Now, a sliding scale that you fell into was a sliding scale of 20-40, wasn't it?

A. Yes, a 50-50 split.

Q. That meant up to a given point you would get a minimum of 20 per cent of the gross receipts for film rental. A. Yes.

Q. And as the gross receipts scaled up, you

(Testimony of Foster M. Blake.)

would get more of the gross receipts as film rental, is that right? A. Yes.

Q. Now, that sliding scale was made upon the—do you know what figures those sliding scales were based on? A. Of course I know.

Q. What were the elements that went into the figure?

A. The operating expenses of the theatre.

Q. The operating expenses?

A. Their fixed charges.

Q. Their fixed charges.

A. All the elements that go into the cost of theatres doing business. Advertising.

Q. Now, did you actually see the expense figures that were actually used, the items that were actually used in the sliding scale?

A. They were always available, and I am quite sure that I saw them, because I have argued house expenses with Fox and many other exhibitors for the most of my life. [2830]

Q. All right. Let's turn to the Guild Theatre. Do you know whether or not they included in the expense figure an item that covered a proportionate share of the income taxes paid by the entire national Fox West Coast chain? Do you know whether they did or not?

A. No, I wouldn't know.

Q. You don't know whether they did and you don't know whether they didn't?

A. That is correct.

Q. Do you know whether they included as one

(Testimony of Foster M. Blake.)

of the items in the expense figure for the Guild Theatre a proportionate share of the expense of maintaining a penthouse on Washington and Vermont atop the Fox Building, do you know that?

Mr. Mitchell: What is the materiality of this, your Honor.

The Court: Sustained. I was just waiting for an objection.

Q. (By Mr. Corinblit): Mr. Blake, the fact is that in the figure of administration which was included in the scale that you agreed to with Fox, you don't really know what items went into that administration figure?

Mr. Mitchell: Objected to as being immaterial. What is all this, your Honor? We don't need to be innuendo or otherwise run down here on facts which cannot be proved—— [2831]

The Court: Sustained.

Q. (By Mr. Corinblit): Mr. Blake, the playing of your pictures on a sliding scale—withdraw that.

Now, you continued to play your pictures in this unit of five theatres for about five years, is that right, through from 1946 to 1951?

A. Yes, sir.

Q. During that time you did not offer your pictures to any other theatre for first run in the city of Los Angeles?

A. We may have. I recollect that there were periods when even this unit with 52 weeks playing time a year did not quite absorb all of our product,

(Testimony of Foster M. Blake.)

and you must remember that in those days we were making, as I said before, between 50 and 60 pictures a year. That alone on one week runs, if we played them all as top pictures, would have been more than sufficient to book the unit.

I believe that occasionally we played a few programs outside the unit, but the unit belonged to us and we were interested in building up to a percentage, and naturally we played the very best pictures that we had in the unit.

Q. When you say you played outside of the unit, Mr. Blake, I want to get this clear. You never played a single picture in any house other than a Fox house or United Artists Downtown?

A. I am not sure whether we did or not. That [2832] may be correct and it may not. The records will have to disclose that.

Q. I will show you the play-off of Universal pictures in the Los Angeles area from 1946 to 1951 and ask you to run your eye down the list of theatres and tell me if you find a single picture played in any theatre other than a Fox theatre or the United Artists Theatre.

Mr. Mitchell: I object to that as being argumentative. He is just asking the witness to read from a document already in evidence.

Mr. Corinblit: The witness has testified he doesn't remember whether or not they played——

The Court: Just a minute.

Mr. Corinblit: Yes, sir.

The Court: Objection overruled.

(Testimony of Foster M. Blake.)

The Witness: How far shall I go?

Q. (By Mr. Corinblit): You can do it in a hurry. Just run your eye down this column all the way through 1951.

A. I have to try to remember whether they were Fox theatres, you know, or were at that time.

I find one here.

Q. Which picture?

A. October 1947, the picture called The Seventh Veil.

Q. It played in the Marcal?

A. Yes. [2833]

Q. Go ahead.

A. The Marcal was not a Fox theatre.

Q. Do you know whether that was a re-issue or not?

A. No, it was not. It was a very, very fine English picture.

Q. Go ahead. Run through 1951.

A. Through 1951? All right. That is the only one I find.

Q. So that refreshes your recollection that with the one exception all Universal pictures played in Fox theatres or the United Artists Theatre Downtown, is that correct?

A. Yes, that is correct. 90 per cent of those played in our Fox unit, though, which I have testified was our main outlet.

Q. Not only is it true they played only in Fox houses, with that one exception and the United Artists Downtown, but the fact is that you didn't

(Testimony of Foster M. Blake.)

offer your pictures to anybody else other than the group of theatres I mentioned, other than Fox?

A. After we finished booking the unit, if we had pictures left over, you might say, I don't know whether we went to anyone else or not, but possibly, since we were playing the unit of Fox theatres and we were finding ourselves backed up with product, it would be quite logical, I think, to go to Fox and say, "We went to get in that other unit." [2834]

Q. But you did not during this period, you don't have any recollection of ever asking anybody else during this period to play your pictures, other than Fox and the United Artists Downtown?

A. That is correct.

Q. I think you testified that after you started out the unit, some time after you started out the unit, you went to the Culver Theatre in Culver City as one of the Theatres. That is out here (indicating). A. Yes.

Q. Was that area of Los Angeles in the opinion of your company, if you know, a suitable area for first run pictures?

A. According to the best judgment available to us at that time, it was.

Q. The Culver City area was? A. Yes, sir.

Q. You know where the Paradise Theatre is located, don't you? A. I do.

Q. Will you tell me what are the characteristics of the Culver City area, what were the charac-

(Testimony of Foster M. Blake.)

teristics of that area at that time that made that a suitable first run area?

A. Well, at the time that the Culver was incorporated into our first run unit, I seem to recollect that the Westchester area was a bunch [2835] of bean fields for the most part. It was just beginning to be developed.

The Court: I don't think you were asked about the Westchester area.

Read the question.

(Question read.)

The Witness: Oh, I see. Well, it was—I can't remember the decisions upon which—I mean the exact factors upon which our decision was based at that time, but Culver City was a fairly thickly populated area, and we felt that the addition of some more seats to our unit would be advantageous to us.

Q. (By Mr. Corinblit): That is to say, the population of the Culver Theatre area was sufficient to make up a suitable first run area, and the transportation facilities in the area were suitable, as were all the other geographical conditions, they were all suitable so that the Culver Theatre was a suitable first run area in 1946?

A. We thought so.

The Court: Counsel, can I ask a question? As far as population is concerned, how much population does it take to support a first run theatre?

The Witness: I don't think I can answer that question specifically, your Honor.

(Testimony of Foster M. Blake.)

The Court: You said the population was sufficient. What do you mean? [2836]

The Witness: I mean it was comparatively densely populated, the area, and it compared favorably with the area in which we were playing our pictures in Studio City, and there was another factor—I don't want to digress, but by that time there was an indication of a little weakening in grosses. We were interested at that point in adding a few more seats to increase our possible gross.

Q. (By Mr. Corinblit): You say at that time you were interested in adding some theatres to the unit? A. Yes.

Q. Now, do you have any idea what the population of the—I will withdraw that.

You knew in 1946 that the Loyola Theatre was operating first run?

A. I don't remember the exact date it started but it probably was 1946.

Q. Have you any idea what kind of profits the Loyola Theatre was earning in the Westchester area?

A. I know nothing about that.

Q. The record in this case, Mr. Blake, shows that the Loyola Theatre in 1948 earned more net profit than the Chinese Theatre. Did you know that?

Mr. Mitchell: He said he doesn't know anything about it so how can he answer the question?

The Witness: I don't know.

(Testimony of Foster M. Blake.)

Mr. Mitchell: And what if he does? I object to the question.

The Court: Objection sustained.

Q. (By Mr. Corinblit): Now, Mr. Blake, turning your attention to 1950. You know that the Paradise Theatre asked your company to permit it to play Universal pictures on a first run basis, don't you? [2838]

A. Yes. I am aware that a request was made.

Q. That a request was made? A. Yes.

Q. And you are aware that Universal refused that request? A. Yes, I am.

Q. When in 1950 and '51—early in 1950 a request was made by the Paradise Theatre for the opportunity of playing your pictures on first run in Los Angeles, did you participate in the discussions with the people in your company to make the decision that you would refuse? A. Yes, sir.

Q. And who did you talk to?

A. I discussed it with Mr. Scully, who was still with us in 1950—

Mr. Mitchell: What did you say? "Still with us in 1950"?

The Witness: Yes, sir. And discussed it with our local branch manager and our West Coast District manager. [2839]

Q. (By Mr. Corinblit): You say you discussed that matter with Mr. Marriott, the branch manager here?

A. I know I discussed it with Mr. Rose and I am sure that Mr. Marriott would be present be-

(Testimony of Foster M. Blake.)

cause I make it a practice of having the branch managers in on these kind of discussions.

Q. So that he participated in the decision which led to the refusal of the Paradise on first run?

A. No, I don't think he participated in the decision. He participated in the discussions.

Q. Did you tell him the reasons why Universal would refuse to license the Paradise first run?

A. I don't remember whether we told him or not.

Q. You don't remember whether that matter was discussed with Mr. Marriott at all?

A. I don't remember that.

Q. Now, do you know how many people there were in the Westchester area in 1950-51?

A. No.

Q. And you didn't know in 1950 and '51 how many people there were? [2840]

A. No. I don't know whether I knew then or not, I beg your pardon, but I don't know now.

Q. Well, now you didn't turn the Paradise down in 1951 because they didn't have enough population around it did you? A. No.

Q. That was not the reason? A. No.

Q. That is to say, the Paradise area, Westchester area had sufficient population to support a first run theatre in 1950 and '51?

A. I am sorry, I couldn't hear all of that question.

Mr. Corinblit: Will you read the question.

(Question read.)

(Testimony of Foster M. Blake.)

Mr. Mitchell: Object to the question on the ground the witness said he didn't know what the population was.

The Court: Objection sustained. He already has said he doesn't know how many people it took to support a first run theatre.

Mr. Corinblit: He said he knew the Culver area had enough people for a first run theatre.

The Court: But he says he doesn't know how many people there were in the Paradise area.

Q. (By Mr. Corinblit): Now, you testified, Mr. Blake, I believe, that your company, which during this period was playing as many as five theatres on a multiple first run—that was 1946 to 1951?

A. Yes.

Q. You testified that since that time, sometime in 1953, you are now playing as many as 8, 9, 10 or 11 theatres on first run? A. Yes, sir.

Q. At the same time? A. Yes.

Q. Now, would you say that out of—could you give me an idea as to the total number—for [2841] example, if you have 50 pictures out of those 50 pictures how many do you sell multiple day and date as distinguished from playing in one or two theatres?

A. I would like to correct the number of pictures. It has something to do with this. We don't have more than 30 pictures a year now.

Q. All right. How would it affect you—

A. Affect us in what way?

Q. Well, Mr. Blake, before you came here to testify I read into evidence the list of Universal

(Testimony of Foster M. Blake.)

pictures from June of 1955 to July of 1956. There were about 32 pictures that Universal played first run from 1955 to 1956 and that list showed that out of that 31 you had two pictures on something that we refer to as a pre-release, or playing an exclusive and every other one played on multiple day and date policy in always more than seven or eight theatres.

Does that proportion sound correct as to the period prior to 1955—that is when you first began this policy.

Mr. Mitchell: What period prior to 1955?

Q. (By Mr. Corinblit): Well, you testified you began the multiple day and date policy when? Was that in 1953?

A. I believe 1953, late in 1953.

Q. I want to know from 1953 to 1955 whether you played roughly 5 per cent or 8 per cent of your pictures on an exclusive basis and played all the rest of them, 92 or 95 per cent [2842] on the multiple run basis.

A. I believe that from the time we started the multiple runs until this point, where you seem to draw a division that a lesser proportion of our pictures played multiple run that they did during the period you quote.

Q. You can't tell me what proportion?

A. No, I can't.

Q. Now, this policy of multiple day and date in 7, 8, 9, 10 and 11 theatres has proved to be a successful policy for Universal, has it not?

(Testimony of Foster M. Blake.)

A. It has recently, yes.

Q. Now, turning your attention to the period 1946 to 1951.

You testified that Universal pictures—you testified as to the quality of Universal pictures in comparison with the quality of pictures of other companies.

Now, you remember that from 1946 to 1955—well, let us just talk about the last year, 1950-51. You were playing regularly in five theatres and they included small theatres for the most part—that is, the five theatres in the unit, except the United Artists downtown—were fairly small theatres, isn't that right? A. Yes, sir.

Q. Now, at the same time that you were playing in that manner Loew's was playing only in two theatres. Do you remember that? [2843]

A. I believe that is correct.

Q. Two or three theatres?

A. (No answer.)

Q. Now, do you have any knowledge how your pictures did in the Los Angeles area which were comparable to Loew's pictures in the Los Angeles area?

A. I know nothing about what Loew's pictures did.

Q. You don't have any knowledge about Loew's box office performance?

A. No, of course not. I do know when a picture seems to be doing business. I read trade papers, reports and things of that sort.

(Testimony of Foster M. Blake.)

The Court: Mr. Corinblit, you have just rung up a no sale, so I think we will take our noon recess at this time.

Ladies and gentlemen, we are about to take another recess and again it is my duty to admonish you you are not to discuss this case with anyone and you are not to permit anyone to discuss it with you.

You are not to formulate or express any opinion as to the rights of the parties until the case has finally been submitted to you.

With that admonition we will now recess until 2:00 o'clock this afternoon.

(Whereupon, at 12:00 o'clock noon, a recess was taken until 2:00 o'clock p.m. of the same date.) [2844]

Friday, August 10, 1956, 2:00 P.M.

The Court: Stipulate the jury is present in the box?

Mr. Mitchell: Yes, your Honor.

Mr. Corinblit: So stipulated, your Honor.

The Court: You may proceed.

Mr. Corinblit: Your Honor, it was called to my attention that I have forgotten to offer the exhibit with respect to the Warners testimony before. We will offer this exhibit entitled the Warners play-off as plaintiff's exhibit next in order.

The Court: It may be admitted in evidence.

The Clerk: Exhibit 85.

(The exhibit referred to was received in

evidence and marked as Plaintiff's Exhibit No. 85.)

FOSTER M. BLAKE

the witness on the stand at the time of the recess, having been heretofore duly sworn, was examined and testified further as follows:

Cross Examination—(Continued)

Q. (By Mr. Corinblit): Mr. Blake, at the time in 1946 when the Universal first run unit was set up, there were included in the unit [2845] five theatres, all of which at that time were being operated by Fox West Coast, isn't that correct?

A. That is correct.

Q. And that included the United Artists Theatre?

A. Yes, sir.

Q. Subsequently Fox West Coast gave up any proprietary interest they had in the United Artists Theatre and the unit continued with the United Artists Theatre in it?

A. Yes, sir.

Q. So at that time you had a unit which included a theatre operated by United Artists and four theatres operated by Fox West Coast?

A. Technically, yes, sir.

Q. When you continued during the period from 1946 to 1951 to license you—I think it was about 1947, started licensing the Culver Theatre in the Culver City area—to license your pictures only to the Culver Theatre in the area, that had nothing to do with the fact that you—withdraw that.

You didn't know one way or another whether you could get more money from some other theatre, did

(Testimony of Foster M. Blake.)

you, in that area, in the southwestern part of Los Angeles? A. I don't suppose we did.

Q. You didn't know one way or the other. Do you remember, incidentally, did the Culver gross as much on the Universal [2846] pictures as the Ritz Theatre? A. I don't remember.

Q. Do you recall generally the Ritz Theatre did gross more, or don't you know one way or the other?

A. I should think that the Ritz Theatre on an average——

The Court: We are not asking what you would think. If you don't remember, just say you don't know.

The Witness: I don't remember.

Q. (By Mr. Corinblit): As a matter of fact, you knew full well in 1950 and 1951 that a theatre in the Paradise area would gross more for Universal on first run than a theatre in the Culver City area?

A. I don't know that I knew that.

Q. You don't know that you knew that?

A. No. I don't recollect having that knowledge.

Q. You know, don't you, that the Loyola Theatre playing first run outgrossed the Ritz Theatre playing first run in 1948 and 1949 and 1950?

A. They weren't playing the same pictures. Probably outgrossed them, yes.

Q. The figures are in evidence, Mr. Blake.

A. I am sure the average gross of the Loyola was in excess of that of the Ritz, yes.

(Testimony of Foster M. Blake.)

Q. In excess. A. Yes. [2847]

Q. Now, turning to just the good pictures — Universal did have some good pictures sometimes. You don't mean to run down all of Universal's pictures, do you, in your testimony? A. No.

Q. As a matter of fact, there were some pictures that I think your company was proud to make during that period, isn't that right? A. Some.

Q. There were some? A. Yes.

Q. You didn't feel with respect to those good pictures that you had, having in mind your knowledge about the Loyola, you knew full well that in the Paradise area in 1950 you could have grossed more than you could have by playing in the Culver City area, didn't you?

A. It is possible, but I don't know that it is true.

Q. Now, as a matter of fact, in each and every area where you played first run from 1946 to 1951, you didn't give any attention to the fact of whether you could obtain more money from an independent theatre in the same area, did you?

A. I don't think we did.

Mr. Corinblit: No further questions. [2848]

Redirect Examination

Q. (By Mr. Mitchell): Mr. Corinblit asked you about the requests that the Paradise Theatre people made in 1950 of Universal for first run.

Why didn't you give them first run in 1950?

A. By that time we were thinking in a different

(Testimony of Foster M. Blake.)

direction, namely, that of shrinking our number of first run theatres.

On the basis of conditions and circumstances existing at that time we felt that they were—that we were overextended. True that is somewhat of a reversal of our previous opinion but there had been a drastic decline in our first run grosses and we felt that carrying these five, or let alone more, overheads would avail us nothing and only dilute our subsequent run revenue from those outlying areas.

Mr. Mitchell: That is all.

Recross Examination

Q. (By Mr. Corinblit): Mr. Blake, during the period from August 1950 to September 18, 1951, the damage period in this case, you had five first run outlets in the city of Los Angeles, isn't that right? [2849] A. That is right.

Q. In other words, your thinking about decreasing the number hadn't yet reached the point where it had been put into a policy, had it?

A. No. We went along with what we had until we could find a better plan.

Q. And you didn't come across with a better plan until about when? Was that 1952?

A. In 1951 we came up with the new plan and that was pretty much clarified and agreed upon among ourselves in Universal in the early summer of 1951.

Q. My point is, when did you put the plan into effect? A. September of '51.

(Testimony of Foster M. Blake.)

Q. That was after September 18, 1951?

A. I don't know the exact date. It was late in September of 1951.

Q. All right. Now, this matter of overhead, Mr. Blake, when you play a percentage picture, a straight percentage picture, is the matter of overhead involved on a straight percentage picture?

A. Not directly, no.

The Court: Now, that has nothing to do with redirect examination or recross. The only thing asked was on one subject.

Mr. Corinblit: I think Mr. Blake gave the [2850] answer, your Honor, but it is not too important. I have no further questions.

The Court: May this witness be excused?

Mr. Mitchell: No, I want to fix that date. I think we can fix it when the new plan went into effect.

Redirect Examination

Q. (By Mr. Mitchell): Mr. Blake, I will show you a copy of a letter dated August 17, 1951, from Mr. Marriott to Mr. Harry Rackin of Exhibitor's Service and ask you to look at that and tell me whether you can refresh your recollection from that as to when you determined upon this new plan of three theatres for first run?

A. This is a bid invitation sent to——

The Court: That is not the question. Read the question to the witness.

Q. (By Mr. Mitchell): Does that refresh your recollection? A. It does.

(Testimony of Foster M. Blake.)

Q. And by the use of that letter, can you tell me when you established your three-theatre first run plan? A. September 26, 1951.

Mr. Mitchell: That is all.

Mr. Corinblit: Just one question, your Honor. I just want to read the three pictures that played [2851] after the determination of this plan on the Universal group, August 29, 1951.

Francis Goes to the Races, United Artists, Ritz, Iris.

In September Little Egypt, United Artists, Ritz and Iris.

September 20, Thunder on the Hill, United Artists, Ritz and Iris.

Recross Examination

Q. (By Mr. Corinblit): The Ritz and the Iris were both Fox houses, weren't they?

A. Yes, sir.

Mr. Corinblit: No further questions.

The Court: May this witness be excused?

Mr. Corinblit: Yes.

Redirect Examination

Q. (By Mr. Mitchell): How were those pictures—what method did you use to license those pictures after September 26, 1951?

A. They were offered to all interested theatres on a bidding basis and the theatres that ultimately played the pictures did so as a result of evaluating those bids or subsequent negotiation. [2852]

The Court: May this witness be excused?

Mr. Corinblit: Yes.

The Court: You may be excused.

Call your next witness.

Mr. Mitchell: I will call Mr. Taylor.

ALFRED R. TAYLOR

called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

The Clerk: State your full name.

The Witness: Alfred R. Taylor.

Direct Examination

Q. (By Mr. Mitchell): What is your occupation, Mr. Taylor?

A. I am the branch manager of Paramount Film Distributing Corporation.

Q. And how long have you had that job?

A. In the Los Angeles office since March of 1945.

Q. You are familiar with the Paramount method of licensing pictures in 1950 and 1951?

A. I was, yes.

Q. I would like to have you describe for me generally, the manner in which Paramount licensed its pictures on a series of successive runs starting [2853] with the first and running through generally the successive runs, telling where you licensed your first run and where you licensed your 7 day runs, and so on.

Mr. Corinblit: Is this 1950-51?

Mr. Mitchell: '50-'51.

The Witness: Well, during the year 1950 and '51, we exhibited our pictures with rare exceptions,

(Testimony of Alfred R. Taylor.)

in the Paramount Theatre-Los Angeles, and the Paramount Theatre-Hollywood.

After that run was concluded, 7 days later, the 7 day availability was played in Inglewood, Huntington Park, Glendale, Pasadena. I believe that is all of the 7 day runs.

Q. (By Mr. Mitchell): Huntington Park?

A. Huntington Park. I thought I mentioned that.

Q. How many seven day runs in each of these outlying suburban cities?

A. We had one 7 day run in each area.

Q. Now, will you go on with your successive runs?

A. Then the next series of runs was the 14 day runs, and at that time in the Inglewood area we had on occasions one and on occasions two. We changed our system there and then we permitted Santa Monica to play, Beverly Hills, Westwood Village and at a later period the two theatres in the San Fernando Valley, and I believe that was all of the 14 day runs. [2854]

Q. Any 14 day runs in these outlying cities that played the 7 day situations?

A. I didn't understand.

Q. At that time did you have 14 day runs in Pasadena and Huntington Park, Inglewood and Glendale?

A. No. The only place where the 14 day run exhibited at that time was Inglewood as it compares to the other 7 day towns. [2855]

(Testimony of Alfred R. Taylor.)

Q. That is with your company?

A. That's right.

Q. Did you play another run later on?

A. Well, those towns that I have mentioned are what we call the fringe towns. In other words, they surround the core of Los Angeles, and on the 21 day availability we then came in closer to the urban area of Los Angeles, which would surround generally Los Angeles downtown and Hollywood, and then we also permitted theatres in the fringe area, such as Hawthorne would follow Inglewood, and Hawthorne would come in on the 21 day.

Q. Then did you have later runs than 21 days?

A. Yes. Then they went down in multiples of 7, 28 days, 35, 42, 49, and so forth.

Q. What is the advantage of licensing pictures in successive runs like that?

A. Well, it is really one of the lifebloods of our business in our opinion. You start off a picture in a key situation, such as Los Angeles, which is considered one of the keys in the United States, and you attempt to establish that picture for your territory. You spend considerable money advertising, and the exhibitor playing first usually charges a higher admission, and he therefore grosses generally more money.

The main thing, however, is to establish the picture. [2856] There are at times exclusive runs we have had where our advertising bill has been as great as our film rental. That is an exception to the rule, but there have been occasions such as that.

(Testimony of Alfred R. Taylor.)

Then you step down in the series of runs, 7, 14, 21 days on down as the picture goes down the line, usually the admission price is a little less. You stagger the runs. You can't have everyone playing the same day, because not everybody can go to the theatre at the same time.

In addition to that, not everyone wants to pay a dollar, which is the first run price, or 75 cents, which is the 7 day price, if that happens to be the case, so by the staggering of runs, you are able to meet every person in a different price income until you finally get down to the point where you may be playing pictures for 15 cents.

Then there is an economic value where the cost of prints is such that it is impossible for us to make prints for every showing in the United States. We have to make a limited number of prints. So it is impossible to play everybody first. Somebody has to play first, somebody has to play second, and somebody has to play third.

Q. How much did your prints at that time cost?

A. Well, I would say in 1950 and 1951, the cost of prints has gone up since that time, the cost is, of course, dependent upon the length of the print itself, the picture. [2857] A black and white print would cost from \$150 to \$200, a Technicolor print from \$600 to \$800.

Q. While a picture was being shown in those days in these two theatres operated by Marco—those theatres were operated by Marco?

A. Operated by Fanchon & Marco.

(Testimony of Alfred R. Taylor.)

Q. The active man was who?

A. Marco Wolff.

Q. While your pictures were being played there, did you have other prints that you used for some purpose during that period of time?

A. Yes. We usually had 12 to 16 prints, depending upon the cost of the picture at the time that it was playing in the two Paramount Theatres. At that time it was generally our policy to play at the same time in San Diego, Phoenix, Tucson, Bakersfield, Santa Barbara—in other words, those are towns that are what you might consider to be sub-keys. They were key towns in their own area, but, of course, smaller than Los Angeles.

By playing those towns at the same time, why, we have the advantage of Los Angeles advertising campaigns, which splashes over into those towns.

Q. What is the reason for the selection of those towns so far away from Los Angeles?

A. Well, they are the large towns in their area. [2858] San Diego is one of our large cities. Phoenix is like Los Angeles as far as Arizona is concerned. It is the most important town in Arizona.

The towns were generally a considerable distance from Los Angeles, so that it protects the Los Angeles run.

Q. What do you mean by protects the Los Angeles run?

A. Well, we feel that the most important town that we have in our entire territory is first run Los Angeles and first run Hollywood. We spend

(Testimony of Alfred R. Taylor.)

considerable money in advertising and we want to obtain every possible dollar from those runs.

Q. While you are playing these surrounding suburban cities in the Los Angeles metropolitan area, like Pasadena, Glendale, Inglewood, and so on, what use do you make of other available prints during that play-off?

A. In addition to the towns that I mentioned—you mean the day and date towns?

Q. Yes.

A. In addition to the towns we mentioned, we also played the pictures in Long Beach and San Pedro, Riverside, San Bernardino, the important subkey towns.

Now, if there was any additional prints that were not being used, we usually booked them into isolated towns, such as Bishop, Lone Pine, Flagstaff, Arizona, San Luis Obispo, towns that are away from any center, because if we were able to book those towns at that time, it relieves the [2859] print problem that arises at a later time when we have what we call our critical period, when the subsequent runs come in en masse and we find ourselves with a print problem.

Q. Do you think these isolated towns interfere at all with the revenue of the 7 day situations?

A. No. Generally speaking, they are very small, and the Los Angeles newspapers are distributed in those towns. They are usually family type theatres. We don't think that it does any harm.

(Testimony of Alfred R. Taylor.)

Q. What in 1950 and 1951 was the average cost of pictures made by Paramount?

A. Well, production costs have risen, of course, since then, too. I would say that the low production cost would probably have been in the neighborhood of \$600,000 and the high production cost somewhere in the neighborhood of \$2,000,000.

Q. And then are there other costs in addition to the production costs which you have to try to get back for your company?

A. Well, I can give you a concrete example right now. We have an exclusive engagement starting at the Paramount Theatre in Hollywood on *War and Peace*, on which we have production costs of slightly in excess of \$6,000,000. That is an exception to the rule, however. It is one of the most expensive pictures ever made. [2860]

I would say that our advertising bill nationally would run somewhere between \$500,000 or \$750,000. That includes newspaper advertising locally, and it includes ads in the *Saturday Evening Post*, *Life* and *Look* and magazines of that nature, and it includes radio and television advertising.

The print cost on the picture—it is unusual in length. It is 3 hours and 30 minutes in length. It is in Technicolor. I would say the print cost would be somewhere in the neighborhood of \$1,250 apiece. We would need from 450 to 500 prints in the United States. The print cost is going to be in the neighborhood of a half million dollars.

(Testimony of Alfred R. Taylor.)

So you have your production cost, your advertising cost, your print cost, plus your distribution cost.

Q. What do your distribution costs run, do you know, in terms of cost of production?

A. They are computed on the basis of 50 per cent of negative cost. In this event it would be \$3,000,000.

Q. What is the source of your income to return these huge costs.

A. The source of income comes solely from theatres to whom we license these pictures.

Q. How many theatres are there in the United States or were there in 1950 and 1951?

A. Well, I would hesitate between 1950 and 1951, because there was quite a number of smaller [2861] theatres in the United States closed at that time, but I would say there was somewhere between 20 and 25 thousand theatres in the United States at that time. However, you do not sell them all because they are competitive to each other.

In other words, you couldn't sell both the Chinese Theatre in Hollywood and the Paramount Theatre in Hollywood. You could only sell one as an example. So, though there may be that many theatres, you are not able to sell all of them your pictures. They are playing pictures from other companies.

We generally feel we have 16,000 potential customers in the United States.

Q. In the Los Angeles exchange area, what kind of film rentals were you getting? What was the

(Testimony of Alfred R. Taylor.)

variation of film rental in those days, from so much to so much?

A. In the entire territory I would say that our film rental low would be around the neighborhood of \$25,000 or \$30,000.

Q. I am talking about from each theatre.

A. Oh, from each theatre?

Q. Yes.

A. Oh, I see. Well, of course, it would all depend on whether the picture was shown as an exclusive run in Los Angeles and was successful. We have earned up to \$112,000 on an exclusive run, but if the picture just played in the Paramount [2862] Theatre Hollywood and Los Angeles, I would say our film rental could be \$20,000 in downtown Los Angeles and possibly \$15,000 in Hollywood on an exceptional picture. The film rental as it goes down the line could get down to \$12.50.

Q. And the people that pay the \$12.50, I suppose, have to play the picture very late.

A. Yes. They are usually delayed run theatres.

Q. With respect to your first run Los Angeles, at that time if you played the theatres operated by Fanchon & Marco, did you have an arrangement with those theatres?

A. We had a franchise with the Paramount Theatre in Los Angeles and the Paramount Theatre in Hollywood, which gave them the right to exhibit our pictures first run. [2863]

Q. And do you remember the expiration date of

(Testimony of Alfred R. Taylor.)

the downtown franchise and that of the Hollywood franchise?

A. The Hollywood franchise expired in September of 1951 and the downtown franchise in March of 1952.

Q. What was the clearance under those franchises?

A. Well, the clearance under the franchise stated that it would be the same clearance that was in effect during the 1938-39 season.

Q. And what was that clearance?

A. That clearance that gave the two Paramount theatres clearance over the surrounding areas in the case of Inglewood and those that I mentioned, Glendale, Pasadena 7 days,—in other words, it gave them the clearance that I related a little earlier.

Q. Well, I would like to have you state the clearance now so that we will have it in one place.

A. I see.

Mr. Corinblit: Just a minute. I will object to that. I think the best evidence is contained in the agreement itself.

Mr. Mitchell: No, no.

Mr. Corinblit: Mr. Taylor is stating what is in an agreement. We have the writing in the courtroom, and I certainly have no objection to offering it in evidence.

Mr. Mitchell: I will introduce the agreements but as a [2864] matter of fact clearance as he said in the agreements, the clearance that was in effect in 1938-39 season—I am trying to have him state

(Testimony of Alfred R. Taylor.)

what the clearance was so we will have it in one place.

The Court: Objection overruled.

The Witness: The clearance of the Paramount theatres gave them the right to have 7 days clearance over Inglewood, Huntington Park, Pasadena, Glendale and the surrounding towns of that type—San Fernando, if I recall correctly was one of those.

Q. (By Mr. Mitchell): What does that mean? Nobody in those towns can play sooner than 7 days?

A. No one could play the pictures in those towns until the Paramount theatres had completed their showing and 7 days had elapsed.

Q. And what was the clearance with respect to other areas?

A. It also provided they would have clearance of 14 days over towns such as Santa Monica, Culver City, Westwood and Beverly Hills and it also gave them a clearance of 21 days over the towns in what we call the urban core of Los Angeles, or the theatres, rather, in the urban core of Los Angeles.

Q. When you say "the urban core," I presume you mean the area inside of these suburban cities?

A. That is correct. [2865]

Mr. Mitchell: Now, so that the record will have the actual provisions which Mr. Taylor has described, at least with respect to the provisions of the franchises, I will offer in evidence the downtown theatre franchise, which is Defendant Paramount's Exhibit H-1 together with its extension

(Testimony of Alfred R. Taylor.)

which carries it to the date that Mr. Taylor specified as Defendant Paramount's Exhibit H-2, and the Hollywood-Paramount Theatre franchise which is Defendant's Exhibit H-3. I offer them in evidence.

The Court: In evidence.

The Clerk: Exhibits H-1, H-2 and H-3 in evidence.

(The documents referred to were marked Defendant Paramount's Exhibits H-1, H-2 and H-3, and received in evidence.)

Q. (By Mr. Mitchell): Now, did you and Marco Wolff and Harry Arthur—Harry Arthur is one of the men interested in Fanchon & Marco, Inc.?

A. He is the president of Fanchon & Marco.

Q. Did you and Mr. Wolff and Mr. Arthur have any discussions as to whether they would permit under their franchise, any theatres to play day and date with the Hollywood-Paramount and the downtown Paramount?

A. Yes. We had a number of discussions. It originally came up when they constructed the Baldwin Theatre, and at that time they wanted to play the Baldwin Theatre first run day and date with the Paramount Theatre-Hollywood and the Paramount [2866] Theatre Los Angeles.

At that time my superior was Mr. Smith, who is now retired——

Q. George Smith?

A. George Smith. And we had talked——

Q. When was this time? Can you fix about the date?

(Testimony of Alfred R. Taylor.)

A. Well, I am inclined to think it is the year 1949 or 1950.

Q. All right.

A. Around in that neighborhood. And they asked us for the right to play the Baldwin Theatre day and date with the other two theatres.

We agreed to consider it on the basis that they would modify the franchise to the point where we were entitled to play or consider other theatres in other areas on the same basis. And at that time they flatly stated that they would not agree to modify the franchise or anything else but for their own benefit. And there was no change ever made as far as the number of first runs was concerned.

Q. Now, the evidence shows, Mr. Taylor, that in 1947 Paramount licensed Golden Earrings to the Loyola, Chinese and Uptown and——

A. I believe it was either the Los Angeles or State.

Q. And that in 1950 Paramount licensed Captain China to those theatres, those being the only ones that Paramount, [2867] according to the evidence here, played in the Loyola. Can you tell the jury why you played Golden Earrings and Captain China in the Loyola at those times?

A. Well, at the time of Golden Earrings the two Paramount theatres found themselves in a congested booking condition. In other words, they had more pictures than they could absorb. The reason for it was there was a number of pictures they had played prior thereto for an extended period of time,

(Testimony of Alfred R. Taylor.)

and we had to do something to alleviate this booking problem in which they found themselves.

They finally agreed in an attempt to relieve this problem, to release us from our obligation to deliver them Golden Earrings.

As you can readily understand, they are not going to release the best pictures they have. I have heard pictures referred to here as "dogs" or "turkeys." I don't call them that.

Golden Earrings in my opinion was a "nervous A."

We have two types of pictures in our business—A and B, and this was what I called a nervous A.

It was a gypsy story with Marlene Dietrich and Ray Milland, who were no great shakes at the box office. They released the picture to us and we sold it to Fox and in selling it to Fox we took, as I recall correctly, a December 14 play date, which is the worst play time of the [2868] year. It is just prior to Christmas, and everybody is busy shopping and no one is going to the theatre. So, we sold it to Fox, which was the best we could do with the problem with which we were faced.

That is the story of Golden Earrings.

As far as Captain China is concerned, we had a dispute with Fanchon & Marco as to the relative value of the picture. I won't call it "a nervous A." I guess it would be a "nervous-nervous A." It is not quite a B, but it is one of those pictures if the hero goes out the door and slams it too hard, the wall will shake a little, but nevertheless it did have some merit.

(Testimony of Alfred R. Taylor.)

It was a sea story, and we felt it should be played at the top-half of a double bill and they felt it should be played at the bottom-half of a double bill, so they finally agreed to release us from our obligation.

So, one day Mr. Smith, who as I said, was my superior at that time, and myself went to lunch at the Fox West Coast commissary. That is a restaurant available for their employees and some outside people, and we met Mr. Zabel, who was then the buyer for Fox West Coast, and Mr. Smith said to him that we are looking for a home for Captain China and he said, "Well, I have a picture called Dakota Lil, which is somewhat the same problem, and I will offer you the Chinese and the Los Angeles and the Uptown and the Loyola on [2869] a split scale and give you equal billing on the advertising," and Mr. Smith said to him, "You have just bought a picture."

And the "equal billing" means that we will get the same amount of advertising space as the other picture. In other words, it assists us in the territory if our pictures are advertised and more important if they put Dakota Lil at the top and Captain China at the bottom in very small letters.

The split scale is we sell pictures on a sliding scale and what it means was that if the earnings were 30 per cent of the gross on the scale, Dakota Lil received 15 per cent of that sum and our picture Captain China received 15 per cent. In other words, the scale was split.

(Testimony of Alfred R. Taylor.)

Again, it was the best we could do with the problem we had and we sold them the way we did.

Q. Now, during the time that is involved in this lawsuit, from the opening of the Paradise Theatre until September, 1951, did you license any more Paramount pictures to the Loyola?

A. No, we did not.

Q. All went where?

A. To the two Paramount theatres. There was one exception, I believe. I believe it was during that time, and I may be mistaken, *Dark City*—it was a picture made by Hal Wallis. It was a quality picture and it was the first [2870] picture in which Charleton Heston appeared and we thought he had potentialities as a personality and they wanted to play it on the bottom half of a double bill, and we wanted them to play it on the top half of the double bill.

It played in the Orpheum Theatre downtown and I don't recall the theatre in Hollywood.

Q. Hawaii?

A. It might have been the Hawaii. I know there was one exception.

Q. All right. Now, during this period prior to September 1951, and prior to the construction of the Paradise Theatre, had you received any demands from the outlying theatres to play first run Los Angeles day and date with the two Paramount theatres?

A. We received a number of inquiries or demands.

(Testimony of Alfred R. Taylor.)

Q. Were they a little more than inquiries?

A. No. I guess that is a misstatement. It was a demand or a request, I guess.

Q. What other theatres that you recall?

A. Well, there was the Picwood Theatre which is in West Los Angeles, the Bards-Adams Theatre, the La Tijera Theatre, the Crown Theatre in Pasadena.

There may be one or two more. I don't recall. I believe the Southside—the Southside Theatre. There may have been one or two more. [2871]

Q. How about the Manchester?

A. No, I don't recall that the Manchester ever made a demand.

Q. How about the Baldwin?

A. I am sorry, yes, the Baldwin Theatre.

Q. How about the Rio or do you recall?

A. I would have to check my record on that. I don't recall about the Rio.

Q. In any event, did you give first run to any of these theatres? A. No, we did not.

Q. Why not?

A. We felt that we were bound by our franchise to deliver the two pictures, the pictures to the two Paramount theatres, that is Paramount Theatre-Los Angeles, and Paramount-Hollywood and therefore, we could not sell a day and date run to anyone else.

Q. All right. Now, these franchises were going to expire, one in September 1951 and one in March

(Testimony of Alfred R. Taylor.)

1952. Did you give any consideration during this period of time to what to do about that—to what to do with your pictures first run thereafter?

A. Yes. For some period prior to the expiration of the franchises, we were considering a different system of distribution in the Los Angeles area. The reason basically [2872] was that the grosses in the downtown area were dropping very rapidly and very steadily, and we just felt that we couldn't depend upon the downtown revenue as a major source of our income unless the pictures that seemed to do well in the downtown area were more of the action-type pictures—pictures of violence and mystery and so forth.

Around that time there was some consideration being given on Hollywood Boulevard to exclusive runs. In other words, we felt that some of the theatre owners there would and were to a minor extent, and would eventually, go into exclusive runs and that would result in our being relegated to secondary theatres, and that situation has come true.

The Chinese Theatre in Hollywood plays Fox pictures exclusively. The Paramount Theatre in Hollywood plays exclusive pictures. The Egyptian Theatre today is playing Oklahoma exclusively. The Warner Bros. for the last year and a half have been tied up with Cinerama, and I understand the Pantages, which is in my opinion the only "A" theatre left on Hollywood Boulevard has been sold Around the World in 80 Days, which is a process similar to Oklahoma, so they will be operating exclusively and

(Testimony of Alfred R. Taylor.)

we find ourselves in a position in Hollywood where we are relegated to "B" theatres. [2873-4]

In other words, two weeks ago we played *Partners*, a Martin and Lewis picture, in the Hollywood Theatre on Hollywood Boulevard, and grossed \$10,000. If we had played the picture in the Paramount Theatre, in my opinion, even though it was a part of a multiple day and date, we would have grossed at least \$20,000.

That is the difference between an A and B theatre.

Q. In 1952, when this franchise situation was expiring, did you visualize something like this coming to pass?

A. Yes. We visualized the Hollywood situation and we were concerned with the downtown grosses. Then there was this great amount of building out in the fringe areas of Los Angeles and we noticed, too, that prominent merchants such as Bullock's and Barker's and the Broadway, and so forth, were building stores out in the fringe areas in addition to their downtown stores.

In other words, we felt that they were attempting to bring a greater amount of their merchandise to a greater amount of their potential customers, so we came to more or less the same conclusion, considering the problem of downtown and the problem in Hollywood.

So we set up what we call the 7 multiple day and date runs. In other words, we attempted to surround the city of Los Angeles, that is, the fringe

(Testimony of Alfred R. Taylor.)

area, with theatres that would play day and date with Hollywood and downtown. We [2875] started off with seven and later we changed them to 10, which was the way in which we now distribute certain of our pictures in Los Angeles.

Q. At that particular period when you — well, let's fix a time. When did you start this multiple run thing?

A. Our multiple system started in July of 1952.

Q. What do you mean by a multiple system? Some people have talked about day and date Hollywood and Los Angeles being multiple. Some people have talked about this Fox Universal unit as being multiple, or the Chinese and Loyola unit as being multiple. What do you mean by multiple first run?

A. I don't consider downtown and Hollywood playing day and date to be multiple. That is just two theatres playing together.

I don't believe that the Universal unit to which they referred this morning as a multiple run. That again is a group of theatres.

We believe that our system of multiple day and dates is a method of surrounding given areas and giving the people in each of those areas an equal opportunity with downtown and Hollywood to see the pictures at the same time. That is what I consider to be a multiple system of day and dates.

Q. Which was the first company to institute this kind of a multiple run system of surrounding the city with multiple runs? [2876]

A. We originated the system.

(Testimony of Alfred R. Taylor.)

Q. This would be in July of 1952?

A. Yes. We put it into effect with the Greatest Show on Earth which, however, had previously played in the Orpheum Theatre downtown and in the Warner's Beverly as what we call merchandising engagements. It was a DeMille picture. It was a very important picture with a very high production cost, and we played it in those two theatres first.

Q. What do you mean by show casing?

A. Well, show casing is our effort to create a want-to-see attitude, I guess you would call it, on the part of the public, which is what we have right now with War and Peace.

As I said earlier, we have a six million dollar production cost. It is a Tolstoi story, written back in the 1800's. No one has ever attempted to make it before, and if you do want to make it right, it is going to cost a lot of money, because the story has such a great sweep to it. Naturally, we don't know if there is anyone in this court room that actually has any interest in seeing the picture, so it is our job to attempt to create a desire on the part of people to see the picture.

We believe that the best way to do it is through a show case.

Yesterday morning when I left the office, our advertising bill for this *engage* at the Paramount Hollywood advance [2877] and first week, as we call it, we lump the advance advertising and first

(Testimony of Alfred R. Taylor.)

week advertising into one figure, had passed \$40,000.

In our business, when you have a picture like War and Peace, you just can't sit back and say, "We have a picture which cost \$6,000,000 and everyone in the United States must come to see it." It just doesn't happen that way.

So we attempt as best we can with enthusiasm to create a desire on the part of these people to see this picture.

I know in this case—well, for example, we rented that billboard, that hand-painted billboard at Wilshire and Fairfax. It cost \$2,000 to paint the board and \$500 a week rent. Well, you may think it is a foolish expenditure. I am sure we don't know whether it is or not, but according to traffic surveys, there are many thousands of people going by that location every day and, therefore, we feel it is a good expenditure.

We employed the use of that blimp that flies around Los Angeles for one week in advance and during the first week of the picture, \$130 an hour for three hours a night, and a sign goes on and off saying War and Peace. We hope it is a good investment, but actually we don't know.

We believe that show casing War and Peace is the best way to present it to the public. [2878]

Q. How many theatres are you going to play War and Peace in first run?

A. Just in the Paramount Theatre, Hollywood. I might add the exhibitor is also doing his part. He

(Testimony of Alfred R. Taylor.)

is re-seating the theatre. He has a \$50,000 expense for the re-seating.

Q. With respect to your productions, how many of them are you now show casing and how many are you putting in these multiple runs to start with?

A. Well, to decide whether or not you should show case a picture or exhibit it in multiple runs depends upon the cost of the picture or the type of the picture or the problem with which you are faced. Every picture is a different problem. As I said, you don't know whether you are going to have a success or a failure.

In the last year we made 16 pictures, and 11 of the 16 pictures have been show cased. The other five we didn't think required that kind of treatment, so every picture is an individual problem.

Q. With respect to the first subsequent run, the 7 day run, and referring particularly to the Inglewood-Westchester area, in 1950 what was the problem down there which faced Paramount with respect to licensing pictures in that area?

A. Well, there had been a great deal of building of homes and stores in the Inglewood area, and the major problem, as we saw it, was that there was too many exhibitors had the [2879] same idea at the same time in constructing theatres.

I believe in the period of 18 months there was 8 theatres in what I call the Inglewood area.

Q. Those 8 theatres were what?

A. The Paradise, Centinela, La Tijera—the Fox

(Testimony of Alfred R. Taylor.)

had been closed for several years and reopened, remodeled, reopened, refurbished.

Q. That is the old Granada, you mean?

A. I believe it was called the Granada. I don't know.

Q. It was rebuilt, wasn't it?

A. No. The four walls were there. The interior was entirely gutted and refurbished and rebuilt.

Q. All right.

A. The Southside and the Rio and the Imperial.

Q. Those were all new theatres?

A. Those were all new theatres.

Q. That is in the period of how long?

A. That is in the period of 18 months.

Q. Go ahead with the problem which confronted you.

A. It so happens that they were all substantial theatres, substantial properties. It wasn't that they were small, what we call store type theatres, where possibly the husband and wife operated the theatre with very few employees and therefore operated with a very low operating expense. They were all very fine theatres and a fine credit to the community. [2880] But they all came in so fast that we found or at least we felt we had a problem in distributing our pictures in Inglewood.

Of course, there is that monster in the living room, the television set, that was starting to come about at that time and not doing us any good.

Q. Well, what did you do about this problem

(Testimony of Alfred R. Taylor.)

that faced you down there? You tell me you had been licensing one 7 day run in that area. What did you then start to do about the problem?

A. Well, during that period of time we made a number of changes. We experimented several times. We were licensing one 7 day run and one 14 day run.

We had requests from the La Tijera Theatre to bid for the exhibition of our pictures on the 7 day availability and the 14 day availability, so we commenced bidding among all of the theatres in the Inglewood area.

Q. When was this, Mr. Taylor?

A. I will have to get out my notes, if you please. We made so many changes trying to solve this problem that I get a little——

Q. A memo to Mr. Taylor?

A. Yes, a memo to myself. In March of 1949 we arrived at the conclusion of taking two 7 day runs instead of one. Now, actually, that was a violation of the franchise that we had with Fanchon & Marco, in our opinion, but we felt it was a [2881] calculated risk and the situation was this, that with those added number of theatres in the area, there came a problem of quality product. When a theatre has a high operating expense, it has got to have quality product every week of the year if there is possibly that many pictures available. So we felt that by adding one run to that area, in other words, taking two runs instead of one, we would just license a quality picture to an additional theatre and.

(Testimony of Alfred R. Taylor.)

help to relieve that problem, which we felt was in existence because of the increased number of theatres.

I sat down one day and totaled up, and of those theatres, those eight theatres, if you computed their seating capacity on the basis of two shows a night, which is the general practice of a theatre, plus three shows on Saturday and Sunday, and usually theatres have four shows on Saturday and Sunday, in a given week the seating capacity of the Inglewood area had increased by 165,000 seats. In other words, there was 165,000 seats more in Inglewood at the time the Paradise opened—— [2882]

Q. Per week?

A. Yes. No, there was in 1945—now, if you want to deduct from that the seating capacity on the same basis of a few of the other smaller theatres that had closed, we arrived at the conclusion the additional seating capacity in Inglewood was 150,000 seats a week, which is a lot of seats, which is one of the reasons that we went to the two 7 day runs.

Then the next month—that is in April of 1949, we changed that and we went back to one 7 day run, but we added to 14 day runs.

We attempted to divide that 14 day run between theatres in the two areas. We had a hypothetical line which we were willing to grant clearance only to theatres on. One theatre could only have clearance over the theatre on their side of the line and not on the other side of the line.

(Testimony of Alfred R. Taylor.)

Then we in May—this is another month, we went—another month had gone by and we made another change.

We went back to one 7 day and one 14 day run.

Q. This was still in 1949?

A. This is all in 1949, and they are all a month apart.

Then in September of '49 we went back to one 7 day run—no, we continued on one 7 day run but we gave the Southside a clearance—a clear 7 day run and we had two 14 day runs. [2883]

And then in April of 1950 we changed to two 7 day and two 14 day runs, but we had no areas. In other words, we took those runs from the entire areas, and the exhibitors could request clearance over any theatres that they chose in the bids that they made. And it was then our determination to decide whether the bid that they made and the clearance that they requested was reasonable or unreasonable.

Q. What theatres did you at that time treat as being in your area?

A. It is what I call the Inglewood area. I would say the Paradise Theatre on the west—

Q. The Paradise Theatre wasn't there in April of 1950. You are talking about April?

A. No, that is right. The Loyola was there. However, they weren't interested.

Well, it would be the La Tijera. The La Tijera was then I would say on the west.

Q. Yes.

(Testimony of Alfred R. Taylor.)

A. And on the east was the Southside Theatre, and then all of the theatres intervening in between them.

Well, let me see now. That was without any areas. That went along for two months and then we changed again and we took two 7 day runs and two 14 day runs. In other words the number of runs were the same, but we created areas. We drew an imaginary line and the theatres on one side [2884] of the line were entitled to ask clearance over the theatres on their side and on the other side it was the same.

Q. This was a north and south line?

A. A north and south line, and that went on for a month.

Then in July of 1950 we inaugurated what we considered was the best system and continued that until we went into the multiple day and date. We continued the two 7 day runs and the two 14 day runs, but we created a circle system that we had. I would have to show it to you on the board. I have never seen it before and have never seen it since, but it was a system which we felt gave the theatres the proper opportunity to play and the clearance or the priority of runs was reasonable. And it was the best system that we were able to devise to solve this problem in Inglewood, and that is the history.

Q. When you devised this system, was that by reason of any deal, understanding, arrangement, conspiracy, combination or agreement with Loew's

(Testimony of Alfred R. Taylor.)

or Universal or Warners or Twentieth Century-Fox or Fox West Coast?

A. No. I most assuredly say it was not because it was strictly of our origin and I don't think anyone understood it but ourselves. We had to explain it very carefully to the exhibitors.

Mr. Mitchell: I would like to have him explain it [2885] because I am sure he can explain it so the jury can understand it, but I think it will take a few minutes, and I was wondering if your Honor wanted to take the recess at this time.

The Court: Yes. We are about to take another recess, ladies and gentlemen, and again it is my duty to admonish you that you are not to permit anyone to discuss this case with you. You are not to discuss this case with anybody and you are not to formulate or express an opinion as to the rights of the parties until the case has been finally submitted to you.

With that admonition we will now recess until 15 minutes after 3:00 o'clock.

(Short recess.) [2886]

The Court: Stipulated the jury is present in the box?

Mr. Corinblit: So stipulated.

Mr. Mitchell: Yes, your Honor.

The Court: You may proceed.

Q. (By Mr. Mitchell): Now, Mr. Taylor, I would like to have you describe your plan for the licensing of availabilities in Inglewood which went into effect last—you say when?

(Testimony of Alfred R. Taylor.)

A. In July 1950.

Q. And continued through 1950 and 1951.

A. Yes, and continued until July 1952.

Q. In describing that plan, let us describe it during the period when the Paradise was there so that the jury can understand how it operated with respect to the Paradise. You say you would like to illustrate it?

A. I believe I can give you a better picture if I do it on the blackboard.

Q. Will you do that?

(Witness going to blackboard.)

A. As I say, it is a bit confusing. It is a plan I never heard of before and I haven't heard of it since, but, as I said, the problem, as far as we felt about it, was with the increasing number of quality theatres in Inglewood, if we added an additional run in the area, it would help to relieve that problem, so I will do it the best way I can. [2887]

That P is for the Paradise and Lo for the Loyola.

Q. I think you better do it on the same compass basis as the map is. Oh, you are doing that. All right.

A. I am trying to. The La Tijera Theatre is up here, roughly, and the Centinela Drive-In Theatre is roughly a little ways from the La Tijera.

Then you have downtown Inglewood and you have the Ritz and the United Artists and the Fox.

Over here you have the Academy and you have the Fifth Avenue, and here you have the Century

(Testimony of Alfred R. Taylor.)

Drive-In and over here you have on the one boulevard the Imperial and you have the Rio and then you have the Southside.

Now, we just simply drew circles around certain of these theatres. We drew that circle which meant——

Q. For the record you will have to state what that circle encompasses.

A. We drew this circle around the Paradise, the Loyola, the Centinela Drive-In and the La Tijera Theatre, which meant if they sent us a bid for a picture, they were entitled to clearance or priority of run over the theatres in their own circle.

Q. When you say clearance, do you really mean clearance in the technical sense?

A. No, it is priority of run, because the next run could come in in 14 days. In other words, if the 7 day theatre [2888] played the picture 14 days, the next day after it closed the 14 day run could come in, so there was no clearance. It was priority of run.

So we drew in the circle covering that area.

Now, you see, the Centinela Drive-In and the La Tijera Theatres are in two circles actually which gave them clearance over or priority of run over the Ritz, the United Artists, the Fox, the Academy or the Fifth Avenue, and vice versa, as far as any of those theatres are concerned. They were entitled to the same priority of run.

Q. What about the theatres, the Academy and Fifth Avenue, the Ritz, United Artists and the Fox in respect of the Paradise? The Loyola is really

(Testimony of Alfred R. Taylor.)

not involved here. They were playing first run Los Angeles with Fox pictures. A. That's right.

Q. So what is the priority of run situation between the Paradise and those other theatres I named?

A. This circle meant if the picture was awarded to the Fifth Avenue, Academy or the Ritz or the United Artists, or to the Fox, they were not entitled to any priority of run over the Paradise, because the Paradise is in another circle.

Q. And the Paradise could play day and date with them?

A. That's right. I believe I have the next one here a little out of balance. The Imperial and Rio should be further under the Century, I believe, but the next circle is that way. [2889]

Q. You will have to describe what that circle encompasses.

A. This circle involved the Academy, the Fifth Avenue, the Century Drive-In, the Imperial and the Rio Theatres, and it means that any of those theatres that happen to be awarded a picture would have priority of run over the other theatres in their circle.

Q. Does that mean, then, that the Paradise could play day and date with those theatres if they got the second highest bid? A. Yes.

Q. If they put in the second high bid?

A. Yes, or if they were awarded the second bid they had priority of run.

The fourth circle was drawn this way, which

(Testimony of Alfred R. Taylor.)

meant it encompasses the Imperial, the Rio, and the Southside. Those theatres would have priority of run over each other if they happened to be the successful bidder.

Q. Then if the Southside happened to be the successful bidder and the Paradise was the second highest bidder, could he play day and date with the Southside?

A. They could both play day and date, which would mean that none of the other theatres could play on the same availability.

Q. So what theatres are there that the Southside cannot [2890] play day and date with if it would get the second highest bid?

A. The Southside cannot play day and date with the Rio or the Imperial.

Q. I didn't mean that. With what theatres is the Paradise prohibited from playing day and date with?

A. If the Paradise was awarded the picture, they could play day and date with any of the other theatres that happened to be awarded the picture, with the exception that it would not be awarded to the Centinela Drive-In or the La Tijera, because they were in the same circle with the Paradise.

Q. They couldn't play day and date with either the La Tijera and the Centinela, the Paradise couldn't? A. That is correct.

Q. But could play day and date with any other theatre in the Inglewood-Westchester area?

A. Yes, that's right.

(Testimony of Alfred R. Taylor.)

Q. All right, you may go back to the stand.

(Witness resuming stand.)

Q. Is that the way you licensed your pictures?

A. Yes. We felt that was the most feasible way that we could devise after the trial and error period that we went through. We commenced that, as I said, in July 1950 and we continued until July of 1952 when we started the multiple day and date plan.

Q. Now, I expect you will be asked and you might as [2891] well give your version now of this mysterious thing called substantial competition. What are your views about substantial competition in this area?

A. Well, all theatres are in competition with each other to some extent. We are not only in competition with the theatres, we are in competition with television, pro football, Motorama and hobby shows and so on. We are all competing for the entertainment dollar. So we in the movie business have to do the best we can to capture as much of that as we can.

The theatres themselves, I mean there is no set plan, as you can see from the way the theatres are constructed, nobody says that the theatres must be five miles apart or on a different street or the same street or so much population for each theatre and so forth. An exhibitor constructs a theatre with the thought that there is a potential in that area and he can operate profitably. [2892]

So the theatres spring up in all different loca-

(Testimony of Alfred R. Taylor.)

tions with the result that every problem that you have in determining availability or run is a separate and individual problem and you have to consider it as such.

So you analyze the situation as you see it and you make your decision and when you do decide, why, it is sometimes the result of discussions with the exhibitors or if you put a plan into effect that the exhibitors object to you discuss the matter with them and attempt to arrive at some other conclusion if his argument is justified.

This is a problem area for the reasons that I told you and, as far as I am concerned, they are all in competition with each other, as far as the Inglewood area is concerned.

Now, if you want to look at the Paradise, for example, which is on one end of the line, and the Southside which is on the other end of the line, personally I don't consider them to be in substantial competition standing alone.

In other words, we were selling two seven-day runs in the Inglewood area. As far as I am concerned, I would see nothing wrong with playing the Paradise and the Southside day and date. I don't consider them to be in substantial competition as such standing alone as I said, but this is an over-all problem. The problem is not the Southside and the Paradise. It is those theatres that are in between there.

So you have to attempt to solve the problem as best you [2893] can. When you try to determine

(Testimony of Alfred R. Taylor.)

substantial competition and you say a theatre is seven or eight miles apart—that is not a great distance in Los Angeles. I mean we are favored with good streets and wide highways and we have a lot of automobiles and you start to determine substantial competition not from one of the line to the other, but, rather, in the middle.

In other words, if the theatres are ten miles apart the problem arises in the middle of it—five miles, because the people that are living in the center or five miles from either theatre can decide to go either way and that is where your substantial competition starts.

In an attempt to determine whether there is substantial competition, as I said, standing alone, I just don't see that there is any substantial competition between the Paradise and the Southside. To me the Southside is a sort of a depressed area in a way. There has been a lot of housing development there, but there is a wide street and streetcar tracks and grass growing in between and it is not very well lighted. The stores are very small and they are not modern or new like they are in the Westchester area.

Does that answer the question?

The Court: Ignoring the Inglewood and Westchester area, what is your definition of substantial competition?

The Witness: Well, my definition of substantial competition [2894] is where two theatres are com-

(Testimony of Alfred R. Taylor.)

peting substantially for the same patronage. Now, you have no——

The Court: On what basis do you base your conclusion? Is it just competing for patronage?

The Witness: Yes. I mean you cannot give it to anyone in figures of per cent, whether it should be 45 per cent, 40 per cent or 30 per cent. Each situation is an individual problem in itself.

I would say, to get down to the least figure, that if two theatres were competing for patronage and one theatre could derive \$50 from the other theatre and that \$50 meant the difference in profit and loss to a theatre, to me that is substantial competition, because they are competing for that dollar to attempt to operate their theatres profitably.

Q. (By Mr. Mitchell): Now, standing alone you think the Southside, from your personal viewpoint, and the Paradise were not in substantial competition. What do you think the situation was as it existed with all of these theatres in between?

A. Well, actually I prefer or would have preferred at that time to have played my pictures in one theatre in the Inglewood area.

Q. Why is that?

A. Because I believe I could get a greater return and a better distribution by playing one theatre in the entire [2895] Inglewood area. But, as I said, we attempted to assist the problem by putting two runs in rather than one.

Q. If you played one run you think that theatre would draw its patronage from where?

(Testimony of Alfred R. Taylor.)

A. Well, I would say that if you played in one theatre it would draw from the entire area. It would get some measure or per cent from each of the areas.

Q. Well, if you played in two then what you are doing is cutting up the patronage to some extent?

A. Well, it is like cutting up an apple pie. If you cut it in half you have a larger portion than if you cut it in thirds or cut it in fourths.

Q. All right. Now, what do you think the competitive situation is with all of these theatres in this area, which theatres are substantially competitive with others, having a view that they are all there and demanding product?

A. Well, I believe there is no question that, starting with the Paradise on the West, that the Paradise is competitive with the Loyola and the Centinela, the La Tijera and the Ritz and the Fox and the United Artists and the Academy and the Fifth Avenue and the Century Drive-In. [2896]

Mr. Corinblit: Is that substantially competitive?

Mr. Mitchell: Yes.

The Witness: Yes, playing the same picture.

Q. (By Mr. Mitchell): You think they draw from each other's area?

A. Oh, definitely.

Q. When you are splitting up the draw?

A. That is correct.

Q. Well, now, you bid your pictures—you put them out on bid?

(Testimony of Alfred R. Taylor.)

A. Well, we felt in view of the requests of exhibitors that they desired to bid for the pictures that in our opinion that was the best way to solve the problem that we had. If you have one item and you have two or more people that are interested in the same item, in our opinion the best way to handle the matter is to let them make an offer.

Q. Well, supposing—by the way, which of these theatres is the strongest grosser—I mean, is there an obvious theatre that is the strongest grosser there?

A. Well, in my opinion the highest grossing picture—the highest grossing theatre in Inglewood is the Academy.

Q. Suppose the Academy wins one bid and the Southside wins another bid, why don't you license the third 7 day run to the Paradise?

A. For the reason you are cutting up the pie again. [2897] In the first place, as I said, we prefer to have one run but we added an extra run to relieve a problem.

Now, if you add another run you are just cutting down the pie again. And in addition to that, under the example you gave, if you played the Academy Theatre and the Southside, why don't you license the Paradise. So you license a third one to the Paradise. Well, the La Tijera has some rights, too, so he would come in and say, "I want to run the picture also," and the operator of the Centinela Drive-In could say, "Well, now, I appeal to a dif-

(Testimony of Alfred R. Taylor.)

ferent type of people than the conventional theatre so I want to run the picture."

And some of the others could make the same statement. So, there is no end to it. You would have them all playing day and date and you would cut the pie up into such little bits there wouldn't be anything left for anyone.

To me that is not the successful way of distributing our pictures.

Successive runs have been a practice in our business for many, many years and no one has ever come up with a better solution to the distribution of pictures than a slow and steady succession of runs down the line.

Q. And you still do that?

A. We still do that and we believe in it unless someone can come up with a better idea, which no one has to this date. [2898]

Q. What other runs did you offer to the others subject to this plan of yours?

A. We offered two 7 day runs with the circle system. Then we had two 14 day runs and we used the same system.

Then after that the runs became sort of a pickup affair. They were less in number and we didn't have bidding because as you go down the line the amount of draw by a theatre of any great distance becomes less and less because the cream has been taken off by the theatres that have played earlier. So, as you go on down the line, the smaller theatre becomes a neighborhood theatre and draws generally from

(Testimony of Alfred R. Taylor.)

their own neighborhood or to a great extent. So, we never bid the 21 day run because there wasn't enough interest in it.

Q. But you did license 21 day runs?

A. Yes.

Q. There is one question I failed to ask you when we were talking about first runs, which I want to ask you before we get too far from it.

The Paradise did demand a first run Los Angeles of your company? A. Yes, it did.

Q. And why didn't you give it to them?

A. We refused it for the reason that we had the franchise in existence with the Paramount Theatre-Los Angeles and Paramount Theatre-Hollywood, which in our opinion, prohibited [2899] us from allowing anyone else to play day and date with the two theatres.

Q. You are referring to the clearance provision?

A. I am referring to the clearance provision of the franchise which gave them clearance over all of the other theatres in the metropolitan area of Los Angeles.

Q. Now, I would like to run through with you, Mr. Taylor, some of your negotiations with the Paradise Theatre with respect to subsequent runs, so that the jury may see how you handled it. And I am sure you can't pick this one theatre out of all of the hundreds in this area and remember what you did, but I will show you — these have been marked, but I will show you some notes which you made so that you may refresh your recollection.

(Testimony of Alfred R. Taylor.)

By the way, do you keep notes on your transactions with these theatres?

A. Yes. Sometimes I slip and sometimes I don't in the rush of things put in the recommendation—they are not always complete in every instance.

The right to approve a bid is solely in our office—that is, at the time of the Paradise opening my superior at that time was Mr. Smith and myself, and we had the sole right to approve the bids and when he retired, Mr. East replaced him and the right to approve the bid is still in the hands of Mr. East and myself—I mean, it is not subject to any [2900] control by New York.

Q. Now, these memoranda—do you keep similar memoranda with respect to other theatres?

A. Yes.

Q. This isn't something you did especially for the Paradise? A. Oh, no, no.

Q. And you say that you didn't necessarily keep a memoranda on every Paradise transaction?

A. No, but we try to. I notice this one that you have here goes back to December, a picture Copper Canyon, which I guess was back in 1950 some time. It says here "2305 to Dunn." 2305 is a form—just a form number, and Dunn——

Q. I don't want you to read the memorandum to the jury. What I would like to have you do is—this memorandum is marked for identification so there will be a record of what we are using here. It is Defendant Paramount's Exhibit D-8, and I would like to have you tell me after you examine that,

(Testimony of Alfred R. Taylor.)

what conversation you had with Mr. Schreiber with respect to the picture Copper Canyon on the 21 day availability and what you did with respect to the price of it. [2901]

Mr. Corinblit: Just a minute. Your Honor, we will object to this procedure. I think Mr. Mitchell knows the proper procedure in handling and using documents to refresh recollection. As I understand the procedure, you ask the witness a question and if he can testify of his own knowledge, he testifies that way. When he doesn't, you refresh his recollection with a document. You don't have the witness read the document and then read it into evidence.

Mr. Mitchell: I am not asking him to read it into evidence.

Mr. Corinblit: Then you ought not to ask him to read it before he says that he has got to read it before he can refresh his recollection. He should first say that he has no recollection. The document has got to be used in that way so that we can refer to it on cross examination.

Mr. Mitchell: I don't understand there is such a got to be, but whatever the judge says I have got to do, then I have got to do it. But obviously the man doesn't remember back in 1950 these detailed conversations about pictures.

The Court: What is the question?

Mr. Mitchell: The question is, will you examine the memorandum and tell me after refreshing your

(Testimony of Alfred R. Taylor.)

recollection what conversation you had with Mr. Schreiber about Copper Canyon.

The Court: Objection overruled. [2902]

The Witness: Yes, I recall it.

Q. (By Mr. Mitchell): Tell me in substance what you talked with him about on Copper Canyon on the 21 day availability?

A. Well, it goes back to a conversation prior to that in which Mr. Smith and I discussed with Mr. Schreiber his theatre, and he wasn't too happy with the results on the 7 and 14 days.

In the course of the conversation we made a suggestion to him as to the advisability of playing the theatre on the 21 day availability. It was our thought that——

Q. Which you expressed to him?

A. This is the conversation with Mr. Smith and myself and Mr. Schreiber.

Q. You told him it was your thought, you mean?

A. We told him we thought it was——

Mr. Corinblit: Can we have a time, counsel, approximately when with reference to the document.

The Witness: I can't tell you the time. I guess it was November, December, after he opened the theatre, and he opened the theatre in August. It was around the latter part of the year, to the best of my knowledge.

Q. (By Mr. Mitchell): In 1950?

A. In 1950.

(Testimony of Alfred R. Taylor.)

Q. So you told him you thought what? Go ahead. [2903]

A. We told him we thought he should try the theatre, it was a suggestion on our part, on the 21 day availability. Our thought was usually on the 7 day availability the second feature is rather a poor one, C or B second feature, and on the 14 day availability, generally speaking, the theatre that plays the picture also plays a poor or inferior second feature.

Our thought was that he had a very fine theatre and that if he could play on the 21 day availability and buy the two strongest pictures that were available, in other words, offer the people two A pictures, that with his seating capacity at his very fine theatre, it might work out very well.

That was a result of this sale of Copper Canyon to the Paradise Theatre on the 21 day availability. We sold him the picture for \$250 and we agreed that upon completion of the engagement we would meet with him again and review the price up or down, upward or downward, based on the result. In other words, the \$250 was a temporary figure and it would be reviewed up or down depending upon the result.

Q. All right. Now, if you will look at your memorandum of January 11th and refresh your recollection, will you tell us what you did with him with respect to the price of Copper Canyon?

Mr. Corinblit: Same objection, your Honor.

The Court: Same ruling.

(Testimony of Alfred R. Taylor.)

The Witness: Yes. We sold him the picture for 7 [2904] days for \$250. He played it 11 days.

We modified the contract so that the price for the 11 days would be the same as the 7 days. In other words, there was no increase in terms because he had played it for four extra days.

Q. (By Mr. Mitchell): Why did you do that?

A. Because in our discussion with Mr. Schreiber we came to the conclusion that the results were not too good.

Q. All right. Now, if you will look at your memorandum of January 16 with respect to Let's Dance and refresh your recollection, will you tell me what conversation you had with Mr. Schreiber about that picture?

Mr. Corinblit: Let me just state, your Honor, the formal objection for the record, and then I may have a continuing objection.

The Court: Same objection.

Mr. Corinblit: The form of the objection is there is no foundation laid, that there is no showing that the witness does not recall prior to use of the document.

The Court: Same objection and same ruling.

Mr. Corinblit: Thank you, sir. May I have a continuing objection?

The Court: You may have a continuing objection.

Mr. Corinblit: Thank you.

The Witness: Shortly after Copper Canyon, we

(Testimony of Alfred R. Taylor.)

had a [2905] picture called Let's Dance become available.

Q. (By Mr. Mitchell): On what availability?

A. On the 21 day availability, and we again sold it to Mr. Schreiber or, rather, at that time, I am sorry, I believe it was Mr. Lehman, we sold it to him for the same price as Copper Canyon, that is \$250, with the same understanding, that we would review the price up or down depending upon the results.

So later we discussed the matter and we reduced the price from \$250 to \$150.

Mr. Corinblit: May the record show that the witness is testifying from the documents which are placed in front of him?

Mr. Mitchell: That's right.

The Court: The record may show he is reading the document to refresh his recollection. He is testifying after his recollection has been refreshed.

Mr. Mitchell: That's right.

Q. The document you are looking at, so Mr. Corinblit can examine it later if he wants, is Paramount's Exhibit D-12 for identification.

A. Yes, but I also looked over to D-18, too.

Q. Excuse me. We will come to that in a moment. A. All right.

Q. You examined with respect to Copper Canyon Defendant [2906] Paramount's Exhibit D-10 for identification.

Now, look at Defendant's Exhibit D-18 for iden-

(Testimony of Alfred R. Taylor.)

tification, and can you refresh your recollection with respect to the picture Let's Dance?

A. Yes. This is the letter to Arthur Dunn in our New York office——

Q. By you? A. From myself.

Q. Yes. I don't want you to read it.

A. I am not going to read it.

Q. I want you to refresh your recollection and tell me what you remember about this.

A. He was the head of the contract department, and this letter advises him we are submitting a modification——

Mr. Corinblit: Just a minute. Your Honor, I object to that.

The Court: You can't tell what the letter says. All you can do is refresh your recollection and testify from your recollection. Now, if it doesn't refresh your recollection and you don't remember, you can't testify.

The Witness: It does. I recall the circumstances.

The Court: Then you can testify what you recall.

The Witness: We reduced the film rental from \$250 to \$150 on the picture Let's Dance at the Paradise Theatre.

Q. (By Mr. Mitchell): Does that also refresh your recollection [2907] as to what his total gross was and whether it included a give-away?

A. Yes. He had a fur coat give-away on one night and he grossed \$1,034 in 7 days.

Q. For what period?

A. In 7 days his gross was \$1,034.

(Testimony of Alfred R. Taylor.)

Q. And you ultimately charged him \$150 for the picture? A. Yes.

Q. Now, if you will examine defendant Paramount's Exhibit D-15 for identification and refresh your recollection as to what conversation you may have had with Mr. Schreiber or Mr. Lehman with respect to the picture Mister Music on a 21 day availability.

A. This was a discussion we had with Mr. Schreiber and we also sold him Mister Music for \$250 with the same provision as Copper Canyon and Let's Dance insofar as a revision upward or downward in the price based on the final results.

Q. What did you finally do? If you will look at both Defendant's Exhibit D-15 and D-20, I think you will be able to refresh your recollection.

A. Yes. We reduced the price from \$250 to \$150 on Mister Music again because the results were not satisfactory.

Q. Mister Music was a Bing Crosby picture?

A. Yes.

Q. In reducing the price this way, are you trying to [2908] injure Mr. Schreiber in some way?

Mr. Corinblit: I object to that, your Honor, as being argumentative.

The Court: Overruled.

The Witness: Well, you don't sell pictures in this business or get along with your customers by injuring them. The success of our business is to keep our prints working every day in as many theatres as possible. We are nothing but salesmen.

(Testimony of Alfred R. Taylor.)

So you attempt to solve your problem specifically with an exhibitor, and this was an unusual problem in that Mr. Schreiber didn't know whether his theatre could operate on 21 days or not, and neither did we, so we more or less arrived at a temporary price for the picture.

Q. (By Mr. Mitchell): All right. Now, if you will examine your memorandum, which is marked Defendant Paramount's Exhibit D-22 for identification, and refresh your recollection, and tell me, if you remember, what you did with respect to the picture, the Paramount picture Branded?

A. The circumstances are the same in that we sold it to him for \$250 and later reduced the price to \$150.

Q. All right. Now, if you will examine your memorandum—these memoranda are all in your handwriting?

A. Yes, other than one which is typewritten.

Q. If you will examine your memorandum marked Defendant Paramount's Exhibit D-16 and refresh your recollection and [2909] tell us the circumstances surrounding the licensing of Sampson And Delilah.

A. Samson And Delilah, that was an important picture that was put up for bid on the 7 day availability under the plan of two runs in the Inglewood area. The picture was awarded to the Paradise Theatre. The other run was awarded to the Century Drive-In.

I'm sorry. I am mistaken about that. It was

(Testimony of Alfred R. Taylor.)

an award made to the Century Drive-In and apparently we had unsatisfactory offers and we were willing to accept another run and we negotiated a deal for the Paradise Theatre for the other 7 day run. That is what happened.

Q. What do you mean by negotiated a deal?

A. Well, you send out the bid letters and you receive back from the exhibitors, if they are interested, an offer for the picture, and you either accept or reject the offers based upon whether or not you feel they are reasonable or unreasonable.

If you feel that the offers received are unreasonable, there are times when we send out second offers, ask for second offers, or there are times when we negotiate.

When the time arises that we negotiate, why, we contact all the exhibitors in the area and ask them if they are interested in negotiating for the picture. If one or more are, again we take their offers verbally a second time, and we [2910] accept the one which we feel is the better for our company.

Q. And this is before you negotiated with the Paradise and accepted its offer? A. Yes.

Q. And the Paradise played the picture on the 7 day availability? A. Yes.

Q. All right. Now, if you will examine your memorandum marked Defendant Paramount's Exhibit D-19 with respect to The Lemon Drop Kid on a 7 day availability, after doing so, tell we what you did with respect to that picture?

(Testimony of Alfred R. Taylor.)

A. We negotiated under bid for the picture and we accepted an offer of the Academy Theatre.

Q. May I interrupt you there? There has been a lot of talk here, Mr. Taylor, about bidding and negotiation, and there seems to be a differentiation between the two. Do you recognize a difference between what we might call formal bidding and negotiating?

A. Well, I was listening to Mr. Greenberg on this formal and informal bidding. We don't have that type of bidding. We have a regular bid form which we send out to the exhibitors and on this bid form it lists all the theatres that are involved in the area, and there is a deadline date on the bid, and they should return their offer to us by that time. When we receive the bids, we analyze them and either accept [2911] them or reject them.

If we reject all of the offers, why, we then negotiate because usually the time between the availability and the time that this occurs is very short, and you can't always send out a second set of bid letters, because many of the bookings in the theatres are made a very short time prior to play date, maybe two or three weeks, and the exhibitor wants to know what his status is on the picture. [2912]

So, we negotiate. In other words, I have the salesman call up all of the exhibitors that are involved and ask them if they desire to make an offer. Now, that is what I call "negotiation."

Q. All right. Now, in this instance you would book the picture Lemondrop Kid up for bid and

(Testimony of Alfred R. Taylor.)

by refreshing your recollection, can you tell me which theatre or theatres won the bid?

A. We put the picture up for bid and it was awarded to the Academy Theatre.

Q. For a one 7 day run?

A. Yes, a one 7 day run. We still have one 7 day run that we are willing to accept, so we negotiated with the Paradise and the Southside for the reason that under the circle system the Academy Theatre has clearance over the other theatres, or priority of run, so the Paradise——

Q. The only theatre, when the Academy wins, the only theatres that can play the second 7 day availability are the Paradise and the Southside?

A. That is right, because the Paradise—the Academy only has priority of run over the theatres within their own circle, and they had no clearance over the Paradise or no priority of run and they had no clearance or priority of run over the Southside, so that leaves us only the two theatres to negotiate with on this picture, because the Academy had [2913] already been awarded the one run.

Q. Did you negotiate with both of them?

A. We negotiated with both of them but in this case the Paradise was not interested and we sold the picture to the Southside.

Mr. Mitchell: Now, your Honor, I notice you are looking at the clock. I am not going to finish this right now and whenever you want to tell me to stop you may do so, but before we do stop, I would like to offer in evidence—I would like to

(Testimony of Alfred R. Taylor.)

mark this as the Paramount circle system, and offer it in evidence before we lose track of it.

The Court: It may be received in evidence.

The Clerk: Exhibit J. [2914]

* * * * *

Mr. Mitchell: Your Honor, I have a document here entitled Bidding for Paramount Pictures, 7 day Run, May 1, 1950, to September 18, 1951, which I would like to have marked defendant Paramount's Exhibit K for identification at this time.

The Court: It may be marked.

The Clerk: Paramount's K for identification.

(The exhibit referred to was marked as Defendant Paramount's Exhibit K for identification.)

ALFRED R. TAYLOR

the witness on the stand at the time of adjournment, having been heretofore duly sworn, was examined and testified further as follows:

Direct Examination—(Continued)

Q. (By Mr. Mitchell): Mr. Taylor, I will show you defendant Paramount's Exhibit K for identification and ask you whether you have checked this against your records and whether it correctly sets forth the pictures offered by Paramount for bid between May 1, 1950, and September 18, 1951, the theatres from which offers were requested, the theatres which submitted offers, and the theatres to which the pictures were awarded. A. Yes, it does.

Mr. Mitchell: I offer this document in evidence.

(Testimony of Alfred R. Taylor.)

Mr. Corinblit: Mr. Mitchell, before you do that, could we have this? The column, Theatres From Which Offers Requested, the requests you are referring to were those made pursuant to written—that is, the testimony is that these were letters of request for bid, is that correct?

Mr. Mitchell: Well, they were a form of request for bid, yes. They were in writing. [2923]

Mr. Corinblit: But they were in writing?

Mr. Mitchell: Yes, they were in writing.

Mr. Corinblit: And that is what you mean by the term theatres from which offers requested, correct?

Mr. Mitchell: Well, let's have the witness say.

The Witness: Yes.

Mr. Mitchell: I don't want to testify.

Q. Just tell us how you sent out the requests for offers. We are talking about what is on this exhibit.

A. We sent out requests for offer form to all those theatres indicated under that column.

Mr. Corinblit: All right.

The Witness: It is a regular form with typing on it.

Mr. Corinblit: And the column, Theatres Which Submitted Offers, again you are referring to written offers, is that correct?

The Witness: Yes.

Mr. Mitchell: Well, you examine the witness a while.

Mr. Corinblit: I don't want to examine him, but

(Testimony of Alfred R. Taylor.)

I will object to the exhibit unless you lay some kind of foundation with respect to the items in this exhibit.

Your Honor, I think plaintiff is within his right in requesting counsel to have the columns explained. I am [2924] not asking that he go through each item, because it is just a question of time.

Q. (By Mr. Mitchell): Just explain what you did with respect to these offers generally and then we will take them up one by one.

A. Well, I explained with reference to the column, Theatres From Which Offers Were Requested. That is a regular form of the company and there is certain typing that goes on the form which lists all these theatres.

The second column is Theatres Which Submitted Offers. These are the names of theatres that submitted an offer to us.

Q. In writing or orally? A. In writing.

Q. In writing? A. In writing. [2925]

Q. And then when you award the pictures, how do you go about doing that?

A. Then the final column is theatres to which the picture was awarded and indicated under this column is the award that we made under bid, but in some instances they were negotiated deals.

Mr. Corinblit: Thank you.

Q. (By Mr. Mitchell): All right. Now, your Honor, rather than read this all at once, which becomes very tedious, and also some of them we will want to deal with individually, if you will per-

(Testimony of Alfred R. Taylor.)

mit me, I will read in part and then so that the jury will understand what this paper is and then we will ask questions as we go along.

The Clerk: Your Honor, is the document in evidence? Mr. Mitchell made an offer but I didn't hear anything.

Mr. Mitchell: I offered it in evidence.

The Court: It is in evidence. I understood it was offered in evidence. It may be I never said "In evidence."

The Clerk: That is right. Paramount Exhibit K. May I put on the date, Mr. Mitchell, please.

Mr. Mitchell: Yes.

(The document heretofore marked Paramount's Exhibit K was received in evidence.)

Mr. Mitchell: Now this starts, ladies and gentlemen of the jury, with the picture No Man of Her Own. [2926]

Q. The date under that, Mr. Taylor, is the date on which you sent out your requests for offers?

A. Yes, May 3, 1950.

Q. All right. And this exhibit shows that requests for offers were sent to the Southside, La Tijera, Imperial, Rio, Ritz, Academy, Fifth Avenue, Fox and United Artists Theatres.

Q. At that time, in May, 1950, how many—these are offers for 7 day availabilities?

A. Yes, they are.

Q. And how many 7 day availabilities were you licensing in this area to this group of theatres at that time?

(Testimony of Alfred R. Taylor.)

A. I will have to look at my little list. As I said the other day we made so many changes—No Man of Her Own in May of 1950, we were taking two 7 day showings.

Q. All right. And this exhibit shows that you received offers from the La Tijera, Imperial, Fifth Avenue and United Artists? A. Yes.

Q. And that you licensed the picture to one theatre, the Fifth Avenue. Do you know why there was not an additional licensing of that picture? A. Offhand I do not.

Q. All right. The next picture is Eagle And The Hawk for which requests for offers were sent out May 23, 1950. [2927] They were sent to the same theatres, and the theatres which submitted offers were the Fox, the United Artists and the Imperial.

The bids were awarded to the United Artists and by negotiations to the Imperial? A. Correct.

Q. The next picture Beau Gest and Bengal Lancer—that was a program of two pictures?

A. It was a re-issue program.

Q. Yes. On June 23, 1950, the offers were sent out and the theatres to which offers were sent were those same theatres which I heretofore read plus the Paradise.

Now, at that time the Paradise was not open. Can you explain why you sent a request for offer to the Paradise?

A. Well, the Paradise was not open but they intended opening very shortly, so we feel it is ad-

(Testimony of Alfred R. Taylor.)

visible in an instance of that kind to send a bid letter out even though the picture may become available slightly before they opened up.

Q. At any rate, you did send the Paradise, among these other theatres, a request for offers?

A. Yes.

Q. And the only theatre which submitted an offer was the Ritz and the Ritz was awarded the bid.

The next picture is Irma Goes West, June 28, 1950. [2928] Requests for offers were sent out. I will read the names of the theatres that they were sent to and hereafter we will refer to them as being the same group so as to save time and tediousness.

The theatres to which requests for offers were sent as shown on this exhibit are the Paradise, Southside, La Tijera, Imperial, Rio, Ritz, Academy, Fifth Avenue, Fox and United Artists Theatre.

The theatres which submitted offers on Irma Goes West were the Academy and United Artists Theatres, to which the picture was awarded—the picture was awarded to the United Artists only. Again, do you have any explanation as to why a second 7 day run was not licensed at that time?

A. Yes, if I recall correctly, the United Artists in their bid requested clearance over the Academy to which, under our circle system, they were entitled to, and therefore the Academy would not be able to play the picture with the United Artists Theatre. Apparently no one else was interested in the picture. [2929]

(Testimony of Alfred R. Taylor.)

Mr. Mitchell: All right. The next picture is Lawless, for which requests for offers were sent out on July 11, 1950, to the same group of theatres. The theatres which submitted offers were La Tijera, Imperial, Ritz, Academy and United Artists, and the picture was awarded to United Artists and Imperial.

The next picture is The Furies, for which requests for offers were sent out on July 24, 1950, to the same group of theatres. The theatres which submitted offers were La Tijera, Imperial and Fox, and the picture was awarded to La Tijera and Imperial.

The next picture—let's go back to The Furies for a moment. I will state for the record—I could have the witness verify it, but I think it is unnecessary—the cut-off card which Mr. Corinblit introduced in evidence for Paramount shows that The Furies started playing on the 7 day availability on August 30, 1950.

The next picture is Sunset Boulevard, for which requests for offers were sent out on August 9, 1950, and the cut-off card shows that it actually commenced playing the 7 day availability on October 5, 1950, which was at a time when the Paradise Theatre was open.

The requests for offers were sent to the same group of theatres. The theatres which submitted bids were Paradise, Ritz, United Artists, Academy and the Southside. The theatres [2930] to which

(Testimony of Alfred R. Taylor.)

Sunset Boulevard was awarded on the bids were Paradise and Southside.

The next picture was Fancy Pants, for which requests for offers were sent out on September 27, 1950, and the cut-off card shows the picture played on October 25, 1950. Requests were sent out to the same theatres. Offers were submitted by Paradise, La Tijera, Ritz, United Artists, Academy, Imperial and Southside. The picture was awarded to La Tijera and Southside.

The next picture was Union Station, for which requests for offers were sent out on October 12, 1950, and which the cut-off card shows played November 8, 1950. Sent to the same theatres. The theatres which offered bids were Paradise, La Tijera, Fox, Ritz, Imperial, and the picture was awarded to La Tijera and Imperial.

The next picture was Cassino to Korea. October 12 was the date on which offers were sent. The picture played November 8, 1950. The theatres to which offers were sent are the same. The theatres which submitted offers were La Tijera and Imperial. The theatres to which the picture was awarded were La Tijera and Imperial.

Q. Now, on this exhibit it shows that those pictures were awarded, not as a result of this bid, but by negotiation. Can you explain how that occurred?

A. Yes. We were dissatisfied with the bids that had [2931] been submitted so we rejected the bids and negotiated with all concerned, because actually—this was a documentary subject. It was not a

(Testimony of Alfred R. Taylor.)

motion picture in that sense. It was a subject that had to do with the Korean war. There wasn't much interest evidenced in the picture.

Mr. Mitchell: Now, the next picture was Copper Canyon, on which requests for offers were sent out on November 13, 1950, and which actually played the 7 day availability on December 6, 1950, according to the cut-off card. The same theatres were sent requests for offers. The theatres which submitted offers were La Tijera, United Artists, Academy, Imperial and Southside, and the picture was awarded to Academy and Southside.

Q. Now, you will recall last Friday, Mr. Taylor, you referred to a memorandum of yours with respect to Copper Canyon and the 21 day availability. On the basis of that memorandum, can you tell us whether at the time Copper Canyon was on the market, you were then having discussions with Mr. Schreiber with respect to his theatre playing a 21 day availability on a trial basis?

A. Yes, we were.

Q. You actually did, as you said the other day, license Copper Canyon to him on a 21 day availability, making an adjustment on the rental finally?

A. That is correct [2932]

Q. Then the next picture is Tripoli, on which requests for offers were sent out on November 20, 1950. The picture actually played December 20, 1950. The requests for offers were sent to the same theatres. The theatres which submitted offers on this 7 day availability were Paradise, La Tijera,

(Testimony of Alfred R. Taylor.)

United Artists, Imperial and Southside, and the picture was awarded to United Artists and Imperial.

The next picture is Let's Dance, for which requests for offers were sent out on December 5, 1950. It actually played on January 14, 1951. Requests were sent out to the same theatres. The theatres which submitted offers were La Tijera, United Artists, Academy, Imperial and Southside. The picture was actually awarded to the Academy and by negotiations to the Southside.

In January, 1951, when this picture played, what kind of availability was Paradise playing at that time?

A. Well, they happened to play this picture on the 21 day availability. I don't recall whether Mr. Schreiber was continuing to operate on a 21 day availability, but he did play Let's Dance on that availability.

Q. You have testified heretofore, on Friday, with respect to the rental arrangements you made on that picture? A. Yes.

Mr. Mitchell: All right. The next picture is Mister Music, for which requests for offers on the 7 day availability [2933] were sent out December 5, 1950. It actually played, according to the cut-off card, January 24, 1951. Requests were sent to the same theatres. The theatres submitting offers, according to this exhibit, were La Tijera, Ritz, United Artists, Academy and Imperial, and the

(Testimony of Alfred R. Taylor.)

theatres to which the picture was awarded were the Academy, and to the Southside by negotiation.

Again, this is another picture which Friday you said was licensed to the Paradise on a 21 day availability. A. That's right. [2934]

Q. And on which you made a modification of the rental? A. Yes. We reduced the terms.

Q. Now, the next picture was Branded for which you offered on January 12, 1951—you requested offers on January 12, 1951, and it actually played February 7, 1951. Offers were sent to the same theatres.

The theatres which submitted offers were the La Tijera, Academy, Imperial, Southside and the picture was awarded to the Academy and Southside by negotiation.

Again from your testimony Friday, Branded was played by the Paradise on a 21 day availability?

A. Yes, it was.

Q. On which you reduced the rent?

A. Yes.

Q. Then the next picture is Dark City. Requests were sent out on January 12, 1951, to the same theatres and the theatres which submitted bids were the La Tijera, the Academy, Imperial and Southside, and the picture was awarded to the Academy and the Southside, both by negotiation.

The next picture—I take it where you have two negotiations there is a reason for that. Do you remember Dark City?

A. Yes. The reason would be that the bids that

(Testimony of Alfred R. Taylor.)

were received were rejected because they were unsatisfactory in our opinion, so we negotiated with all concerned. [2935]

Q. When you say "with all concerned," what do you mean by that?

A. Well, we contact all of the exhibitors in the area regardless of whether they submitted a bid originally or not, because things change in our business and where an exhibitor might not make a bid this week, because he cannot use the picture, because of changes of availabilities and whatnot, why, the following week he may be desirous of having the picture. So, it is always necessary in our opinion to solicit all of the theatres over again.

Q. Did that include the Southside—I mean the Paradise? A. Yes.

Q. The next picture is *At War With The Army*. Requests were sent out on February 9, 1951, and the picture actually played March 7, 1951. And this list to which requests were sent has additional theatres, and I will therefore read it so that I can again follow the same practice.

At War With The Army, according to this exhibit, requests were sent to the Paradise, Southside, La Tijera, Imperial, Rio, the Ritz, the Academy, the Fifth Avenue, the Fox, United Artists and the Centinela Drive-In and the Century Drive-In.

Can you explain the addition of the drive-ins on this offer of a 7 day availability?

A. Yes. It was originally our practice to keep the [2936] drive-in theatres back of the conventional

(Testimony of Alfred R. Taylor.)

theatres to some reasonable extent. I don't mean by that that the drive-ins played the last run in the area, but it was our custom to permit the conventional theatres on the early availabilities to play ahead of the drive-ins.

The drive-ins over a period of time had requested the right to compete for an earlier availability.

The position of the drive-ins was becoming different in our industry. The drive-ins started off many years ago and originally we wouldn't sell them our pictures because we felt they were a detriment to the business.

Originally they had a large speaker down in front of the screen and if you had your car down near the front of the screen, why, you would be literally blasted out of your car from the sound.

If you were back too far, why, you couldn't hear at all. They also had quite a light problem because of the length of the throw from their projection room to the screen and they, of necessity, had to have a very large screen with the result they were throwing so much on the film they were buckling the film in many instances and buckled film has to be discarded by us.

Through a period of time, however, they invented the in-car speaker which permits the speaker to be hooked on to the door of your car. [2937]

There was also an improvement in projection equipment. It became water cooled with the result they could throw more light on the film without injury to the film.

(Testimony of Alfred R. Taylor.)

The later drive-in theatres were built substantially and not in their original make-shift way, and they were daily becoming of increasing importance to our industry, and today they occupy a very important part of our business insofar as contribution to our total film rental is concerned.

So, we felt that the time had arrived that these drive-ins should be given the right to bid for the early availabilities and that was the reason they were added into this group. •

Q. All right. At War With The Army. Bids were sent in by the Centinela Drive-In, by the Ritz, United Artists, the Academy, Century Drive-In and the Southside and the bids were awarded to the Academy and the Southside.

The Great Missouri Raid. Requests for offers were sent out on February 21, 1951. The picture actually played commencing March 7, 1951, according to the cut-off cards.

Requests for offers were sent out to these same theatres, including the drive-ins and the theatres which submitted offers were the Centinela Drive-In, United Artists, Academy, Century Drive-In, Southside and the Ritz and the picture was awarded to the United Artists and the Century Drive-In.

The next picture was Quebec. Requests for offers were [2938] sent out on February 21, 1951. The cut-off cards show the picture started playing on 7 day availability on March 14, 1951.

Requests were sent to the same theatres including the drive-ins. The exhibit shows no bids were re-

(Testimony of Alfred R. Taylor.)

ceived and that the picture was negotiated to the La Tijera and the Imperial.

Again on that negotiation what theatres did you solicit for offers on the negotiation?

A. We solicited all of the theatres. The picture was a very inferior one.

Q. It was an inferior picture? A. Yes.

Q. Mollie is the next picture. Requests for offers were sent out on February 21, 1951, to these same theatres. The exhibit shows that you received no requests or offers and you didn't play the picture on that availability in the Inglewood-Westchester area.

A. This is really a bad one. This really a bad one.

Q. This was really a bad one?

A. It was terrible.

Q. The next picture September Affair. Requests for offers were sent out on March 9, 1951, and it actually played on the 7 day availability commencing April 4, 1951, according to the cut-off cards.

Requests were sent to the same group of theatres including [2939] the drive-ins. The theatres which submitted offers were the Academy, Century Drive-In, and the theatres—the theatres to which the picture was awarded was the Academy and to the Southside by negotiation.

The next picture is the Redhead And The Cowboy. Requests for offers being sent out on March 15, 1951. The picture actually started playing on

(Testimony of Alfred R. Taylor.)

the 7 day availability in Inglewood on April 4, 1951. Requests were sent to the same theatres. The only theatre submitting a bid was the Academy. The bid was awarded to the Academy and the second 7 day run negotiated to the Southside. [2940]

The next picture was Mating Season.

Q. Let's stop a moment on The Redhead And The Cowboy. There is an exhibit on that. Do you recall anything about a discussion with Mr. Lehman after that picture had actually been awarded, and negotiated?

A. Yes. If I recall correctly, there was some reason why he could not play the picture, and actually we awarded it to him, if I recall correctly.

Q. No. I think I better get a reference to that, perhaps, and refresh your recollection.

Mr. Corinblit: Could we have that comment about what he thinks stricken from the record?

Mr. Mitchell: Yes. I think that is incorrect. That is another picture we have to deal with.

The Witness: I know there was one picture of that type.

Q. (By Mr. Mitchell): Mr. Taylor, I will show you Plaintiff's Exhibit 3-B, a copy of it, which is in evidence, and ask you to refer to the date of the request on the Redhead And The Cowboy, and then after reading that letter, and Mr. Lehman referred to Plaintiff's Exhibit—a memorandum which was not introduced in evidence, dated March 27, and I think from those you may be able to refresh your

(Testimony of Alfred R. Taylor.)

recollection on what happened on *The Redhead And The Cowboy*.

Mr. Corinblit: Your Honor, may I have the same [2941] objection to the procedure Mr. Mitchell is using of having the witness read from documents?

The Court: I beg your pardon?

Mr. Corinblit: May I have the same objection that I had last Friday to the procedure of Mr. Mitchell?

The Court: Yes, you may have a continuing objection. Same ruling.

The Witness: Yes. I recall the circumstances.

Q. (By Mr. Mitchell): All right. Will you state what you recall about *The Redhead And The Cowboy*?

A. Mr. Lehman wrote me a letter asking for the right to play *Redhead And The Cowboy* in the *Paradise Theatre*. At that time the awards had already been made and I informed him that his request was received too late.

Mr. Mitchell: The next picture is *Mating Season*, requests for offer having been sent out on March 15, 1951, the picture actually having played on the 7 day availability, according to the cut-off card, on April 15, 1951, requests being sent out to the same theatres, including the drive-ins. The theatres which submitted bids were *Centinela Drive-In*, *Academy* and the *Century Drive-In*. The picture was awarded to the *Academy* and to the *Southside* by negotiation.

(Testimony of Alfred R. Taylor.)

The next picture is *Samson And Delilah*, requests for offer having been sent out March 20, 1951, and the picture actually commencing playing May 4, 1951. The theatres to which [2942] requests were sent were the same group, including the drive-ins. The theatres which submitted offers were Centinela Drive-In, the Fox, the Fifth Avenue—this exhibit shows the bid of the Fifth Avenue was withdrawn—and the Century Drive-In. The exhibit shows that the bid was awarded to the Century Drive-In and that the picture was licensed to the Paradise by negotiation.

Q. Now, you have a memorandum on that. If you will refresh your recollection from the memorandum, perhaps you can tell us how you went about your business of negotiating with the Paradise and why. Do you have it there before you?

A. I am trying to locate it.

Q. I think if you will turn those earlier ones over, Mr. Taylor, we will be needing those others. These you have used already.

A. I think we received bids from the Centinela Drive-In and the Fox and the Century Drive-In, and as you said, the Fifth Avenue submitted an offer but withdrew it, which they are privileged to do if they withdraw it prior to the award.

We awarded the picture to the Century Drive-In, which gave them clearance over the Fifth Avenue.

We were dissatisfied with the Fox and Centinela Drive-In offers and we negotiated with all concerned

(Testimony of Alfred R. Taylor.)

for the second run that was available, and we awarded it to the Paradise Theatre. [2943]

Mr. Mitchell: All right. Now, the next picture is the one we were discussing at the close of Friday's session, Lemon Drop Kid. Requests for offers were sent March 20, 1951. The picture actually played on the 7 day availability in the Inglewood area on May 30, 1951. Requests were sent to all the theatres, including the drive-ins and including the Paradise, according to this exhibit. The theatres which submitted offers, as shown on this exhibit, were United Artists, Academy and Century Drive-In, and the picture was awarded to the Academy, and the second 7 day run was awarded to the Southside by negotiation.

Q. Now, if you will look at your memorandum on Lemon Drop Kid, I think you can refresh your recollection and tell us what happened with respect to the Paradise.

A. The Paradise was not interested in the picture.

Q. That is, you actually negotiated with them?

A. Yes, we negotiated with everybody.

Q. But your memorandum refreshes your recollection on the fact that the Paradise was one that was not interested? A. That is correct.

Mr. Mitchell: All right. The next picture is Appointment With Danger. Requests for offers were sent out April 30, 1951. The picture actually commenced playing on the 7 day availability, according to the cut-off card, on June 20, 1951. These

(Testimony of Alfred R. Taylor.)

requests were sent to the same group of [2944] theatres. The theatres that submitted offers, according to Exhibit K, were Paradise, La Tijera, United Artists, Academy and Century Drive-In. The theatres which actually received the awards of the picture were the Academy and by negotiation the Southside.

Q. Now, you have a memorandum there with respect to Appointment With Danger. Perhaps you can tell us what happened there. I think there are three documents there. There is a memorandum, a letter, and a second memorandum, which will enable you to refresh your recollection. Do you have all three of those?

A. I find two of them.

Mr. Mitchell: If I could have Defendant Paramount's Exhibit E-22 for identification.

Q. Well, to save time here, I will furnish you with our copy. You might as well refresh your recollection from that as anything else. These documents are marked for identification Defendant Paramount's E-26, E-21 and—what is that one, Mr. Taylor? A. E-22.

Q. E-22. If you will examine those, I think you will be able to refresh your recollection.

A. We negotiated a deal with the Paradise Theatre, and the Paradise Theatre was awarded the picture, and then subsequently—— [2945]

Q. You say "awarded." You mean awarded by a bid or awarded on negotiation?

A. On a negotiation.

(Testimony of Alfred R. Taylor.)

Q. All right.

A. And they found themselves unable to use it and they asked to be relieved of the obligation and we cancelled the contract and then we negotiated a deal with the Southside Theatre.

Q. Now, the next picture is Last Outpost. Requests for offers being sent out on May 28, 1951.

The picture having played on the 7 day availability in the Inglewood area on June 27, 1951, as shown on the cut-off card.

Requests for offers were sent to the same group of theatres including the Paradise and the drive-ins. The theatres which submitted offers were Centinela Drive-In, United Artists, Academy and Century Drive-In and Southside. And the theatres to which the picture was awarded was the Century Drive-In and by negotiation the Southside.

Q. Now, if you will refer to your memorandum, which is marked Defendant Paramount Exhibit 20 for identification—pardon me—exhibit—Paramount Exhibit 27 for identification and a handwritten memorandum which has not been marked but which I will show counsel and then show you. I think you can refresh your recollection as to what happened [2946] on Last Outpost.

The Clerk: You said Paramount Exhibit 27.

Mr. Mitchell: Exhibit E-27—Paramount Exhibit 27.

The Witness: This pertains to the 14 day availability.

(Testimony of Alfred R. Taylor.)

Mr. Corinblit: What are you referring to, Mr. Taylor?

Q. (By Mr. Mitchell): You are referring to Paramount Exhibit E-27? A. Yes.

Q. That refers to the 14 day availability?

A. Yes.

Q. Now, I will show you a picture—I will show you a pink interoffice communication which is in your handwriting, is it not? A. Yes.

Q. And I think by examining that, you can refresh your recollection on the 7 day availability?

A. Yes. From the offers we received we accepted the offer of the Century Drive-In and because we accepted that offer in our negotiations we were limited to the Southside or Rio or La Tijera Theatres plus the Paradise.

The only theatre that was interested in the picture as I mentioned, was the Paradise.

Mr. Corinblit: Your Honor, I move to strike that portion of the answer as non-responsive and being a conclusion of the witness. He states the only theatre that was interested [2947] was the Paradise. We can't meet that evidence. We have to have testimony that he picked up the telephone and said, "Will you buy the picture," and somebody said, "I won't buy," and I move to strike that portion of the answer upon those grounds.

The Court: Read the question.

(Question read.)

The Court: Now, read the answer.

(Answer read.)

(Testimony of Alfred R. Taylor.)

The Court: The answer may go out.

Mr. Mitchell: You are in error.

Mr. Reporter: I am not in error.

The Court: Ask the question again.

Q. (By Mr. Mitchell): Will you state, having refreshed your recollection—your entire answer has gone out. Now, I want you to state what happened with respect to the picture *Last Outpost*?

A. Well, we received five offers, one from the Centinela Drive-In, the United Artists, the Academy, the Century Drive-In and the Southside.

We accepted the offer of the Century Drive-In under our circle system. Certain of the theatres, of course, were limited because the Southside—because the Century Drive-In has priority of run over those theatres, so in our negotiations we contact all the theatres that can play the [2948] picture, which happened to be the Rio, the La Tijera, the Paradise and the Southside. We negotiated a deal with the Southside. The Paradise was not interested.

Mr. Mitchell: Now, when you say the Paradise was not interested, how do you reach that conclusion? What did you do that led you to that conclusion?

The Witness: I contact all of the exhibitors—

Mr. Corinblit: Just a minute.

The Court: Not what you do. Tell us what you did in this instance.

The Witness: I can't recall exactly what I did in this instance. I mean it is impossible for me to

(Testimony of Alfred R. Taylor.)

say. Sometimes, as I say, the salesman—I tell the salesman to do something for me, and possibly one of the salesmen contacted them in this instance.

Mr. Corinblit: I move to strike the answer.

The Court: The last part of the answer may go out.

Q. (By Mr. Mitchell): From your memorandum and your general practice, can you tell us what happened with respect to the Paradise?

A. Well, this memorandum is in my handwriting and it is a note to the sales manager to put through the contract which I awarded.

Mr. Corinblit: Your Honor, I move to strike that answer. It is a statement of what is in a memorandum. [2949]

The Court: It may go out.

The Witness: I am having difficulty.

Q. (By Mr. Mitchell): Just state, having refreshed your recollection from the memorandum, what happened with respect to this attempt to get the Paradise to buy the picture.

Mr. Corinblit: Your Honor,—

The Court: What is your recollection of this matter? You may refresh your recollection, if you can and after you have refreshed you recollection, tell us what your recollection is. Do you remember about this transaction?

The Witness: This I cannot say truthfully, your Honor, that I personally called the Paradise agent. Sometimes I did and sometimes I didn't.

I have a sales manager and three salesmen. They

(Testimony of Alfred R. Taylor.)

contact the exhibitors as well because they solicit them under normal circumstances.

A certain salesman in the office is responsible for the sales to the Paradise Theatre.

Now, as an actual instance of the Last Outpost I can't truthfully say whether I called him or whether I told the salesman—or the sales manager to contact him or the salesman to contact him, but I finally get a final report from everybody that contacts all of the theatres if I didn't do it personally and individually.

Q. (By Mr. Mitchell): And when you have gotten that—— [2950]

The Court: Just a minute, Mr. Mitchell.

Mr. Corinblit: It is not clear what the answer is meant to say. For the most part, it is a conclusion, your Honor.

Mr. Mitchell: He is telling what his practice is.

The Court: Denied. I want to get the record straight, Mr. Mitchell.

Now, when you go through this routine, then, do you make a memorandum of what you do?

A. The conclusions come to me whether I do it myself and already have them, or whether they come from the salesmen or the sales manager and a decision is made as to what we should do in the manner of disposing of the picture.

Q. (By Mr. Mitchell): Then you make a memorandum of what has happened?

A. Yes, because a contract has to be put through

(Testimony of Alfred R. Taylor.)

and that memorandum is a notice to put through the contract.

Q. All right. For the purpose of showing past recollection recorded, your Honor, under conventional rules of evidence, I want to read into evidence the matters recorded which indicate that there was a negotiation with the Paradise Theatre, and they were not interested.

Mr. Corinblit: Just a minute. This document in no way meets the requirements of any past recollection recorded.

It is not a recording of his past recollection in any way, shape or form. It is a document which is simply a [2951] conclusion included in a record, and therefore is not a recollection of his own and that is the sole vice of all of this testimony.

Mr. Taylor has not been testifying as to what he remembers. He has been testifying as to summaries and conclusions which he is now basing upon general practices.

I will object to the document upon that ground. I object to the document because it is hearsay and I object to the document because it is immaterial and irrelevant in this case.

The Court: The thing that bothers me, Mr. Mitchell, is that it is a memorandum written by the witness to somebody else in his office.

Mr. Mitchell: That is right.

The Court: And I ruled the other day I wasn't going to let those memorandums in.

Mr. Mitchell: This is on a different basis. I

(Testimony of Alfred R. Taylor.)

think perhaps your Honor's ruling was incorrect but I don't have to struggle with you on that. I don't have to struggle with you on that. This is a different principle of evidence.

I think perhaps I should ask one other question.

Q. Your memorandum, Mr. Taylor, was it true when you prepared it? A. Yes. [2952]

* * * * *

The Court: I will sustain the objection. You dig up the Supreme Court cases. Maybe the Supreme Court cases will make me change my mind, but it seems to me under the authorities you have presented you don't have a right to read the document. Now, if Mr. Corinblit wants to read the document, I think he can read it.

Mr. Mitchell: Then, if I may have the paper, your [2964] Honor, I will have it marked.

The Court: It may be marked for identification.

The Clerk: For Paramount?

Mr. Mitchell: Yes.

The Clerk: Paramount's Exhibit E-36 for identification.

(The exhibit referred to was marked as Defendant Paramount's Exhibit E-36 for identification.)

Q. (By Mr. Mitchell): I am going to show you a group of documents, Mr. Taylor, Defendant Paramount's Exhibit D-8 for identification, D-10, D-12, D-18, D-15, D-20, D-17, D-22, E-16, E-19, E-26 and E-36, and ask you if those were kept by you in the regular course of business.

(Testimony of Alfred R. Taylor.)

A. Yes, they were.

Q. Was it your regular course of business to keep papers of that kind and those papers in the regular operation of your business as a distributor of motion pictures? A. Yes.

Mr. Mitchell: I offer all those documents in evidence.

Mr. Corinblit: Objection, your Honor, on the ground the documents are hearsay, conclusion of the witness, immaterial, incompetent as far as this case is concerned, and that no foundation has been laid with respect to admissibility under the business record rule. [2965]

The Court: May I see some of those?

(Witness handing documents to court.)

The Court: Objection overruled. They may be admitted in evidence.

Mr. Mitchell: Could I take the pink one and I will read it to the jury.

The Clerk: I have to put them in evidence first. Just a minute.

Paramount's Exhibit D-8, D-10, D-12, D-15, D-17, D-18, D-20, D-22, E-16, E-19, E-26 and E-36.

(The exhibits referred to were received in evidence and marked as Paramount's Exhibits D-8, D-10, D-12, D-15, D-17, D-18, D-20, D-22, E-16, E-19, E-26 and E-36.)

Mr. Corinblit: May it please the court, E-36, which you have just admitted, is, I believe, subject to the same proposition on the ruling you just made.

(Testimony of Alfred R. Taylor.)

The Court: Let me see that.

Mr. Corinblit: Yes, sir. I think there are others, too.

The Court: Well, on the other exhibit, Mr. Corinblit, the witness said he had no independent recollection. He hasn't testified as far as this exhibit is concerned. If you want to take him on voir dire and establish the fact that he doesn't have any independent recollection, I may change my opinion.

Mr. Corinblit: All right, sir.

The Court: But so far there has been no objection [2966] raised along that line.

Mr. Corinblit: All right, sir. I would like to take the witness on voir dire for that purpose.

Voir Dire Examination

Q. (By Mr. Corinblit): Mr. Taylor, calling your attention to the picture Outpost, did you have some negotiations with anyone at the Paradise Theatre? A. Me, personally?

Q. Yes. A. I don't recall.

Q. Did you have some recollection, to your knowledge, were you present at any negotiation between anyone connected with Paramount and anyone connected at the Paradise? Were you personally present at such meeting?

A. I do not recall. [2967]

The Court: Where did you get the information to put down on that slip?

The Witness: Either I contacted the exhibitor myself and talked to him or other exhibitors that

(Testimony of Alfred R. Taylor.)

are listed there, or under my direction either the sales manager or the salesmen were instructed to contact the exhibitor and I finally get a report.

The Court: And they come back and tell you?

The Witness: They come back and tell me. After all, the best way to sell pictures is to contact all the exhibitors and get all the possible offers we possibly can.

Q. (By Mr. Corinblit): Do you know from whom—well, there is testimony in the record from whom offers were received—who were interested in the picture—withdraw that. Do you have any recollection of any negotiations with any theatres on the picture *The Outpost*? A. No.

Q. Do you have any knowledge, of your own personal knowledge, of negotiations by anyone connected with Paramount, that is, personal knowledge having been present at such negotiations?

A. I have no personal knowledge as to having one of the salesmen or sales manager present or contacting anyone by telephone.

Mr. Corinblit: Very well, your Honor, I call your Honor's [2968] attention to the sentence——

The Court: Let me see the document.

Mr. Corinblit: Yes. I am referring to the third line from the bottom.

The Court: I am going to sustain the objection to this document, Exhibit E-36 until after lunch. In the meantime you may find some Supreme Court cases to support your contention.

(Testimony of Alfred R. Taylor.)

Mr. Mitchell: I am offering it as a business record now, your Honor. Do you want cases on that?

The Court: Business records?

Mr. Mitchell: Sure.

Mr. Corinblit: Your Honor, we submitted a memorandum on the question of business records, an extensive memorandum.

The Court: Yes, I know you did and I read your memorandum.

Mr. Corinblit: And the document as a business record fails to meet the basic requirement of the foundation having been laid. Mr. Mitchell's only foundation, the only foundation he laid was the matter that it was kept regularly.

Now that under the cases is not sufficient. Mr. Mitchell must show with respect—in the first place, a business record cannot, does not avoid the objection of conclusions and hearsay. The precise and exactly the same ruling with respect to hearsay and conclusions is applicable to business records [2969] as is applicable to any other type of evidence and the memorandum cited cases to that effect, particularly a Second Circuit case decision by Judge Frank.

The business record rule was intended to apply to accounting details or books and records which record day-to-day figures and where there is no reason to falsify and there is an internal check. Here, particularly here, where litigation—where Mr. Taylor was going to attorneys and receiving letters from attorneys these memoranda—

(Testimony of Alfred R. Taylor.)

The Court: May I ask this witness a question?

Mr. Corinblit: Yes.

The Court: Was this document, Exhibit E-36, made in the regular course of your business?

The Witness: Yes, sir.

The Court: Was it your custom and practice to make a memorandum or record of the transactions after such a transaction as this?

The Witness: Yes, sir.

The Court: Did you do it all the time?

The Witness: I would say not in every instance.

The Court: In the majority of cases?

The Witness: In the great majority of instances.

The Court: Regardless of who you were dealing with?

The Witness: That is correct.

The Court: And was it made at the time of the act, the [2970] transaction?

The Witness: Yes. It might have been later in the day or the next day. Some of those are hand-writing because I do them in an evening or possibly on a Saturday or Sunday.

Mr. Corinblit: Your Honor, I know your Honor is referring to the words of the statute, but if your Honor would—perhaps we might defer this entire matter until after lunch.

The Court: Well, you overlook the second paragraph of Section 1732. The second paragraph says:

“All other circumstances, the making of such writing or record including lack of personal knowledge by the entry maker may be shown to affect its

(Testimony of Alfred R. Taylor.)

weight but such circumstances shall not affect its admissibility.”

Mr. Corinblit: Yes, sir. Now, in the light of that statute, the cases that we have included in the memorandum, and it has been quite extensive—I had the opportunity to discuss the matter with you—show, and these are Supreme Court decisions, your Honor, and your Honor recalls the basic case. The basic case is a case——

The Court: I have had your memorandum and went over it and the objection is overruled. It is admitted into evidence.

The Clerk: Paramount Exhibit E-36 in evidence.

(The document referred to was marked Defendant Paramount’s Exhibit E-36 and received in evidence.) [2971]

The Court: Now, I might say to the jury that if this document is read to you, you must remember the last paragraph of the section that I have just read to the effect that if there is any conclusions in the writing or if the writing is made without the personal knowledge of the writer, that this information should be considered by you in judging its weight or the credence you should place upon the document. It is one of the things for you to consider.

Mr. Corinblit: Your Honor, Mr. Mitchell offered as a group that document and another group of documents. There is quite a large group here and for the record let me state I have the same objection to the other documents as I have to this one

(Testimony of Alfred R. Taylor.)

and I would perhaps, if I get an opportunity during the lunch hour, if I get an opportunity during the lunch hour to go over them I may be able to convince your Honor that some of these as well as the others don't meet the test called for by the cases.

The Court: Same objection, same ruling. If you want to make a motion to strike I will entertain it after you have looked up the authorities.

Direct Examination—(Continued)

Q. (By Mr. Mitchell): Now, we will try to get by with The Last Outpost with this memorandum. It reads: "Inter-communication"—with the Paramount trade-mark on it. "To Ralph." Who is Ralph? [2972]

A. Ralph Carmichael. He was the sales manager in our office at that time.

Q. "From," and I can't read your initials there. I guess it is yours. What is the initial there?

A. A.R.T.

Q. That is you? A. Yes.

Q. It is dated June 9th.

"Okay. Put through Outpost—7 day avail."

That stands for availability?

A. That stands for availability.

Q. "7 days, \$400. Southside. L.A."

And there is a set of digits "2305." What is that?

A. That is the number of the recommendation form.

(Testimony of Alfred R. Taylor.)

Q. "In Inglewood area on 7 day availability. Willing accept two runs from offers received. Offer of Century D.I." and that means Century Drive-In?

A. Century Drive-In.

Q. "Being separately submitted on Last Outpost. Due awarding picture to Century D.I. limited in negotiation for second showing in Southside or Rio or La Tijera or Paradise. Only theatre interested was Southside. Negotiated deal and Mr. Smith approved submission of attached deal for Southside." [2973]

* * * * *

Q. (By Mr. Mitchell): Now, Mr. Taylor, in preparing Defendant Paramount's Exhibit E-36, did you know at the time what the circumstances were with respect to the licensing of 7 day availability of Outpost?

Mr. Corinblit: Just a minute, your Honor. I object to the question as having been asked and answered. That is the document, your Honor, that he said he did not know a thing in the world about, didn't remember anything about, didn't know anything about.

The Court: That is not the question. The question is, did he know the situation that existed down in Inglewood.

Mr. Mitchell: At the time.

The Court: Objection overruled.

The Witness: Yes, I was fully acquainted with it.

Q. (By Mr. Mitchell): And when you wrote up

(Testimony of Alfred R. Taylor.)

this document, [2978] did you try to correctly and truthfully set forth what had happened?

Mr. Corinblit: Your Honor, I will object to that. It is immaterial what he tried to do. It has got to be based on his own personal knowledge, and it is not based on personal knowledge. I object to that.

The Court: When you wrote that document, it was true, was it? The things you put down there were true?

The Witness: Yes.

The Court: To the best of your knowledge.

The Witness: I handle all the bidding myself.

The Court: Objection overruled.

Mr. Mitchell: Now we can go to the next picture. The next picture, according to Defendant Paramount's Exhibit K, was a picture called Trio. According to this exhibit bids were offered or requests for offers were made on June 5, 1951. The picture actually played, according to the cut-off card, on July 18, 1951.

The requests for bids were sent to the following theatres, being the same group, but since it has been such a long time since they were stated, I will state them again, the Paradise, Southside, La Tijera, Imperial, Rio, Ritz, Academy, Fifth Avenue, Fox, United Artists, Centinela Drive-In and Century Drive-In. The theatres which submitted offers were the Ritz and Fifth Avenue, and the picture was awarded to one [2979] theatre, the Fifth Avenue.

Q. Can you tell me something about the picture

(Testimony of Alfred R. Taylor.)

and something about the reason why you only licensed one 7 day run on that picture?

A. This was a picture that actually came under the category of an art picture. It was three short stories by Somerset Maugham put together and there wasn't very much interest in the picture in commercial theatres. It was mainly a picture which was suitable only for art theatres.

Q. Why did you license only the Fifth Avenue?

A. Because the Fifth Avenue made an offer which granted them clearance over the Ritz, or priority of run over the Ritz, and there was no other offers.

Mr. Mitchell: The next picture is Dear Brat. Requests for offers were sent out on June 7, 1951, the picture actually playing, according to the cut-off card, on July 4, 1951. Requests were sent to the same group of theatres and there was one bid, Fifth Avenue. The picture was awarded to the Fifth Avenue.

Q. Was there any reason why you licensed only a single 7 day run on that picture?

A. The picture was not successful at the box office. It was a small B picture.

Mr. Mitchell: The next picture is Passage West, requests for offers being sent out, according to Exhibit K, [2980] on June 19, 1951, the picture actually playing, according to the cut-off card, on July 25, 1951. Requests for offers were sent to the same group of theatres. The theatres which submitted offers were Centinela Drive-In, which offer was

(Testimony of Alfred R. Taylor.)

withdrawn, according to Exhibit K, the Century Drive-in, which offer was also withdrawn, according to Exhibit K, and the Fifth Avenue. The theatre to which the picture was actually awarded was the La Tijera Theatre by negotiation.

Q. Can you explain why you licensed only one 7 day run on this picture?

A. It was a picture with a western background and was not very successful.

Mr. Mitchell: The next picture is the picture War Path, requests for offers being sent out on July 10, 1951, and the picture playing, according to the cut-off card, on August 15, 1951. Requests were sent to the same group of theatres, and the theatres which submitted offers, according to Exhibit K, were Centinela Drive-In, La Tijera, Century Drive-In and Fifth Avenue, and the picture was actually licensed to the Century Drive-In and the La Tijera.

Q. Now, do you have before you the defendant Paramount's Exhibit E-31 for identification? If you will look at that and refresh your recollection, if you have a recollection after looking at it, tell me what the circumstances were with respect to the licensing of the Century Drive-In and *the* [2981]

A. I recall the incident in this case. As far as the Paradise was concerned, the exhibitor was booked with outside product at that time.

Q. What does that mean, booked with outside product?

(Testimony of Alfred R. Taylor.)

A. When the picture War Path was available on a 7 day availability in Inglewood, the Paradise Theatre was already booked with product from another company during that week. [2982]

Q. Therefore, he couldn't use the picture?

A. He couldn't use the picture.

Q. All right. The next picture That Is My Boy, offered on July 10, 1951, which actually played the 7 day availability on September 5, 1951, offered to the same group of theatres.

The theatres which submitted offers according to Exhibit K were the Centinela Drive-In, La Tijera, Ritz, United Artists, Academy, Century Drive-In, and the picture was awarded to the Century Drive-In and the La Tijera.

The next picture was Peking Express offered on July 10, 1951. That actually played the 7 day availability according to Exhibit K on August 8, 1951.

It was offered to the same group of theatres. The theatres which submitted bids were Centinela Drive-In, Ritz and Fifth Avenue, and the theatres to which the picture was licensed were the Fifth Avenue and by negotiation to the Southside.

I have here an interoffice memorandum consisting of two sheets which I will ask be marked for identification and I will show it to counsel.

The Court: It may be marked for identification.

The Clerk: Paramount Exhibit E-37 for identification.

(The document referred to was marked Paramount Exhibit E-37, for identification.) [2983]

(Testimony of Alfred R. Taylor.)

Q. (By Mr. Mitchell): I will ask you to look at this interoffice communication and see whether you can refresh your recollection from that, and if you can tell me how you happened to negotiate the licensing of the picture to the Southside and what, if anything, you had to do with the Paradise?

A. Well, from the offers received, we accepted the offer of the Fifth Avenue which gave them priority of run over the theatres within their circle, with the exception of the Paradise and the Southside.

Q. When you say "gave them priority of run over the theatres within the circle," let us come back to the Fifth Avenue's circle. They had priority of run over what theatres?

A. The theatres within their own circle which in that case would be the Centinela Drive-In, the La Tijera Theatre, the Ritz Theatre, the United Artists Theatre, the Fox Theatre and the Academy Theatre; the Century Drive-In, the Imperial Theatre and the Rio Theatre.

Q. That is the Fifth Avenue picked up two circles on this priority of availability?

A. That is correct.

Q. Now, that leaves available for the second availability in the area what theatres?

A. The Paradise or the Loyola or the Southside.

Q. The Loyola was playing Fox pictures first run? [2984]

A. Yes.

Q. So practically it left the Paradise and the Southside?

A. Yes.

(Testimony of Alfred R. Taylor.)

Q. All right. Now, what did you do in order to get one of these theatres to buy a second 7 day availability?

Mr. Corinblit: This is of his own knowledge, if your Honor please.

The Witness: Well, it is in my own handwriting. The Paradise had Excuse My Dust and was not interested because he also had as a second feature Night Unto Morning, so the exhibitor was not interested in the picture and we negotiated a deal with the Southside.

Mr. Corinblit: Your Honor, I move to strike the answer as being a conclusion of the witness. Let the witness testify as of his own recollection that he requested of the Paradise to negotiate the picture.

The Court: Denied.

Q. (By Mr. Mitchell): I will just hang on to that so we can do all of those at once.

Now, the next picture is Here Comes the Groom——

The Court: Mr. Mitchell, before we go into Here Comes the Groom, it is 12:00 o'clock.

Mr. Mitchell: All right. We won't have the groom at this time, your Honor. * * * * * [2985]

Q. (By Mr. Mitchell): When we recessed at noon, Mr. Taylor, we had come on Defendant Paramount's Exhibit K to the picture Here Comes the Groom, which was offered on August 3, 1951, which actually played on October 3, 1951, on the 7 day availability. The offer, according to Exhibit K—or,

(Testimony of Alfred R. Taylor.)

rather, the request for offer was sent to Paradise, Southside, La Tijera, Imperial, Rio, Ritz, Academy, Fifth Avenue, Fox, United Artists, Centinela Drive-In and Century Drive-In, and the theatres which submitted offers were the Academy, United Artists, Century Drive-In and La Tijera. The theatres to which the picture was awarded were the Academy and the Paradise by negotiation. [2987]

Mr. Corinblit: Do you have the date on that, Mr. Mitchell, the date when it played?

Mr. Mitchell: I have the date—yes, I have the date when they played, which I read into the record, and I have the date of the award, also.

Mr. Corinblit: May I have the date of play?

Mr. Mitchell: I read that into the record. It is already in the record.

Mr. Corinblit: Could you give it to me, because I don't have *Here Comes the Groom* playing at the Paradise during that period.

Mr. Mitchell: No, it did not. It was awarded during the period, but it played, as I said, on October 3, 1951.

Mr. Corinblit: All right.

Q. (By Mr. Mitchell): Will you examine your memorandum on *Here Comes the Groom*, Defendant Paramount's Exhibit E-35 for identification, and after having done so, will you tell us whether that refreshes your recollection on how you went about negotiating with the Paradise and when?

A. Yes. When we accepted the offer of the Academy Theatre, under our circle system the other

(Testimony of Alfred R. Taylor.)

run could go either to the Paradise or the Southside.

Q. And no one else?

A. No one else. The Southside made us an offer [2988] and the Paradise made us an offer and we accepted the offer of the Paradise.

Q. Can you tell on or about the date that occurred?

A. Yes. I looked it up a few days ago. October 3 to 9, 1951, was the play date.

Q. But when you accepted the offer was when?

A. September 7, 1951.

Q. Will you give us the one week gross at the Academy and Paradise Theatres of *Here Comes the Groom*?

Mr. Corinblit: Your Honor, I call attention to the fact that the grosses were being—well, I will withdraw the objection. Go ahead.

The Witness: The Academy in seven days, October 3 to 9, 1951, grossed \$3,750. The Paradise, identically the same play time, October 3 to 9, 1951, grossed \$2,818.

Mr. Mitchell: I would like to have also in the record the national gross and the Los Angeles exchange area gross on that picture. We can stipulate to that. The national gross which I would like to have stipulated was \$2,465,000.

Mr. Corinblit: What picture?

Mr. Mitchell: *Here Comes The Groom*.

Mr. Corinblit: Oh, yes. Go ahead.

(Testimony of Alfred R. Taylor.)

Mr. Mitchell: And the Los Angeles exchange area, \$140,000. [2989]

Mr. Corinblit: Yes, I will stipulate to that. Now, will you stipulate with me, Mr. Mitchell, that on that date with that picture the Paradise played Rich, Young and Pretty, a Metro picture, on the 21 day availability?

Mr. Westbrook: Those are from what records?

Mr. Corinblit: Those are our own records.

Mr. Westbrook: You have never produced those before.

Mr. Corinblit: You never asked for them before, but Mr. Mitchell has gone outside, you understand, and I am going outside now.

Mr. Westbrook: Let's do it subject to correction.

Mr. Corinblit: All right. Thank you.

Mr. Mitchell: I would also like to have a stipulation on the national gross of the Warner Bros. picture Captain Hornblower, which played at the Academy and Southside Theatres in September 1951, prior to September 17, the national gross being \$2,382,000 and the Los Angeles exchange area gross being \$161,000. Will you stipulate to that subject to correction? I think Mr. Westbrook can show it to you right now, if you want to.

Mr. Corinblit: Yes, I will stipulate to that subject to correction. [2990]

Mr. Mitchell: Now, your Honor, in order to complete this file of memoranda and other papers in connection with these negotiations with the Paradise, I will now offer in evidence Defendant Para-

(Testimony of Alfred R. Taylor.)

mount Exhibit E-21, which is a letter from Mr. Taylor to Sydney Lehman, dated June 6, 1951, which Mr. Taylor examined in giving his testimony.

And Defendant's Exhibit E-22 for identification, a letter from Mr. Taylor to Harry L. Rackin, who is one of the Lehman organization, dated June 7, 1951, to which Mr. Taylor also referred.

These both refer to the picture Appointment With Danger.

The Court: They may be received in evidence.

The Clerk: Paramount's Exhibits E-21 and E-22 in evidence.

(The documents referred to were marked Defendant Paramount's Exhibits E-21 and E-22 and received in evidence.)

Mr. Mitchell: Now, I will also offer in evidence the following memoranda to which Mr. Taylor referred in his testimony, Defendant Paramount Exhibit E-31, with respect to the picture War Path; Defendant's Exhibit E-37 with respect to the picture Peking Express and Defendant's Exhibit E-35 with respect to Here Comes the Groom.

These are the same sort of memoranda as your Honor admitted just before lunch.

Mr. Corinblit: Your Honor, I would like to [2991] make a record here on voir dire, if I may.

The Court: You may.

Voir Dire Examination

Q. (By Mr. Corinblit): Mr. Taylor, I will show you the memorandum E-37 and ask you whether

(Testimony of Alfred R. Taylor.)

or not with respect to the picture Peking Express, whether you had any negotiations with the Paradise. A. Yes, sir; I did.

Q. You negotiated with the Paradise yourself?

A. Yes.

Q. And you have a recollection of that?

A. With Mr. Lehman.

Q. You negotiated with Mr. Lehman?

A. Yes.

Q. What did you say and what did Mr. Lehman say?

A. I can't recall what I said but I can recollect—I recollect when I read the memorandum—the reason that I could recollect our conversation was because he told me at the time of these two pictures that he had booked Excuse My Dust. It was a fine picture and not too successful in its early runs but it was a picture that should generate word-of-mouth advertising and I recall chiding him about this second feature. He had Night Unto Morning and tried to sell him on the idea my picture would be more valuable and that is why I happened to make a note of it. [2992]

Q. Prior to this memorandum had you had any instructions from counsel in this case to prepare memoranda of your conversations with Mr. Lehman? A. No.

Q. You were, however, referring all matters to counsel at that time?

A. Back in these years?

Q. Yes. A. Oh, no.

(Testimony of Alfred R. Taylor.)

Q. You were not?

A. Not to my knowledge.

Q. You weren't referring them to Mr. Carman over at O'Melveny & Myers at all?

A. No, no. Bidding is solely—the right of approval on bidding was solely with Mr. Smith at that time, who was then my superior, and myself.

Q. Had you prior to that time had any instructions from counsel with respect to the Paradise Theatre? A. No.

Q. None at all? A. No.

Q. You are sure of that?

A. I am positive. That is why I said yes.

Q. Now, you make the same answer—well, let us turn to the motion picture War Path. [2993]

Did you have any personal discussions with anyone connected with the Paradise Theatre?

A. Yes, sir, I talked to Mr. Lehman about it.

Q. And do you remember what you said and what he said?

A. No, I don't recall what he said or what I said, but I recall the circumstances because the picture happened to be made by a friend of mine, Nat Holt, whom I have known for many years.

Q. And your answer with respect to discussions with legal counsel that you just gave applies to this document as well? A. Yes, sir.

Q. And with respect to the document marked E-35, the picture here being Here Comes the Groom. Did you have any negotiations with the people connected with the Paradise directly?

(Testimony of Alfred R. Taylor.)

A. Yes.

Q. And do you remember what you said or what anyone connected with Paradise said?

A. I do not recall that all our memoranda in all our bidding situations are identically the same because I personally have charge of the bidding. And as I explained the right of approval of bidding is with us. Other contracts are subject to approval of the New York office. So I watch it very carefully so I cannot be criticized by the home office for making a mistake. [2994]

Mr. Mitchell: When you say—

Mr. Corinblit: Just a minute. Your Honor—well, did you have some further examination before I offer these?

Mr. Mitchell: Yes. I just want to clear up an answer.

Direct Examination—(Continued)

Q. (By Mr. Mitchell): You say on bidding the right of approval is with you. Does that or does that not include these negotiations that you enter into when you take one bid and then go negotiate with the Paradise for the second 7-day availability?

A. It includes all the bidding situations regardless of how the picture was finally negotiated, whether by bidding or negotiation.

Q. I want to ask two other questions. These memoranda which I have just described into the record and about which Mr. Corinblit has just asked you, were they kept in the regular course of your business? A. Yes.

(Testimony of Alfred R. Taylor.)

Q. And was it your custom in your business to keep memoranda of this kind?

A. Yes, particularly in the bidding situations because I was solely responsible.

Mr. Mitchell: I offer these documents in evidence.

Mr. Corinblit: The same objection, your Honor. [2995] No foundation has been laid with respect to the offer under the business record rule and to point that out here, the witness testified with respect to these matters and there is no necessity of putting them into evidence.

The Court: Objection overruled. They may be admitted in evidence.

The Clerk: Paramount Exhibit E-31, E-35 and E-37.

(The documents referred to were received in evidence and marked Defendant Paramount's Exhibits E-31, E-35 and E-37.)

Q. (By Mr. Mitchell): Now, this morning, Mr. Taylor, you spoke about the development of the drive-in theatres and how you started licensing them in the middle of this period of time, or offering them on bids on a 7-day availability in the Inglewood area.

Did the development of drive-ins have any significance in connection with your method of distribution after March 1952 when your franchise with Fanchon & Marco ran out?

A. Yes. It was one of the factors that we consid-

(Testimony of Alfred R. Taylor.)

ered when we commenced a system of multiple day and date. [2996]

Q. In what way?

A. Well, going back many years the drive-ins, as I endeavored to explain this morning, were inferior, and as years went by they became very substantial theatrical enterprises, and when a new drive-in would come into an area and it was the only drive-in in the area, why, then, he was really without any competition, so they didn't care where they played pictures, whether they were old or new. It made no difference to them as long as they bought them very cheap.

The drive-in theatre people in those early days took a very definite take it or leave it attitude. They offered you a very cheap film rental, which you could either accept or reject, because there is more pictures on the market than they could possibly use.

Q. What time are you talking about when this condition existed?

A. Oh, I am going back to 1944, 1945, around in there, the early part of the drive-ins.

Q. How long did this buyer's market for drive-ins exist?

A. Well, I don't know exactly, but after World War II, when building materials became available and other exhibitors realized the potential of drive-ins, why, there were more drive-ins built.

Now, as additional drive-ins are built, they become more competitive to each other, and as they

(Testimony of Alfred R. Taylor.)

[2997] became more competitive to each other, then they became very much aware as to where they played pictures, because the more competition they have, then they desire to play earlier runs so that they can gross a greater sum of money.

So the drive-ins not only were increasing or improving their plants, but they were asking for pictures on an earlier availability.

Q. That is why you went to a 7 day run, as you described this morning?

A. Yes. We offered them the opportunity to negotiate competitively with the other theatres for the 7 day availability.

Q. After your franchise ran out in March 1952, what significance did the drive-ins play in your multiple run plan?

A. They were one of the factors in determining that we would attempt a system of multiple runs. They weren't the only factor.

Q. What kind of factor were they? I am trying to have you describe why they had anything to do with your multiple run system.

A. The factor was in our opinion the thought that they could generate substantial grosses in drive-in theatres.

Q. Had anyone else tried what you call the multiple run system before you did, or shortly after March 1952? [2998]

A. No. We originated the system.

Q. There is evidence here that Universal played its pictures in four or five theatres prior to that,

(Testimony of Alfred R. Taylor.)

and that Twentieth Century-Fox played its pictures in four theatres. How do you differentiate that from what you call a multiple run system that you originated?

A. Well, I believe in the case of Universal, they were just putting a group of theatres together to try to get an outlet of some kind. I am not considering that multiple runs. That is just a group of theatres put together and operated as best they can.

In our case we put one multiple run in each of the surrounding areas of Los Angeles, which we thought was an intelligent approach to the problem.

Mr. Corinblit: Your Honor, I move to strike the answer beginning with the words "I believe," as a conclusion.

The Court: Here is an expert. He is entitled to give his opinion. Overruled.

Q. (By Mr. Mitchell): How do you differentiate what you call multiple runs from the group of theatres that Fox was using to play its own pictures?

A. Fox, as I recall, had four theatres, and they just put them together and were exhibiting their own pictures in their four theatres.

Q. What is the difference between that and the [2999] kind of multiple run system you say Paramount invented?

A. Again we have attempted with some intelligence to put one multiple run in each of the surrounding areas of Los Angeles, giving all of the

(Testimony of Alfred R. Taylor.)

exhibitors in that area an equal opportunity to play the picture.

Q. All right. Now, in connection with that multiple run, have you found it advisable to add to it the feature of a show case exclusive run?

A. Well, we never intended when we created the multiple runs to eliminate the show casing of motion pictures. Each motion picture has to be considered individually and separately on its own merits. To us there were certain pictures made that warranted show cases and certain pictures that warranted exhibition in multiple runs, so we determined what we would do as each picture became available and we screened it and determined its potential.

Q. You testified that 11 out of your last 16 pictures have been show cased. Will you give the jury the names of the pictures, of those 16 pictures the 11 you have show cased and the five that you have run without show casing?

A. Well, I added one more to the multiple run this morning, because at the time that I originally computed this, I didn't have *Partners* in there, which is a Martin and Lewis picture. So it now totals to 17 pictures.

The reason I chose 17, that is the number of [3000] pictures which our company released during this last season, we exhibited in the multiple runs *Girl Rush*, *Ulysses*, *Lucy Gallant*, *Artists and Models*, *Leather Saint*, and *Partners*.

(Testimony of Alfred R. Taylor.)

Q. What kind of pictures are those, if you can characterize them or categorize them?

A. Well, two of the pictures are Martin and Lewis pictures. We feel that Martin and Lewis have their own fans and their format is basically the same. Martin sings and Lewis makes funny faces. Basically, they are the same story with just a little change here and there.

As I say, they have their fans and we don't feel anything could be added by show casing the pictures, because there isn't going to be any great amount of word of mouth advertising, because their fans are already established.

Girl Rush was a very expensive picture with Rosalind Russell. It was a disappointment to us. It was not what we expected for the money that we had in it. We did not feel there would be any favorable word of mouth advertising, so we might as well put it in 10 theatres in a hurry and hope to fool somebody that would be attracted by the advertising and come to see the picture.

Ulysses was a classic. It was with Kirk Douglass. It was made in Italy and it was a very fine picture of its type, a lot of action. I don't think it was a picture that would generate any word of mouth advertising. [3001]

Lucy Gallant was an oil well story, had considerable action in it, with Jane Wyman and Charlton Heston. I don't think it would create any word of mouth advertising.

Leather Saint was a picture with John Derek

(Testimony of Alfred R. Taylor.)

and Caesar Romero and Paul Douglas. It was an attempt to make another Going My Way. It was a similar type story. It was just a picture made at a very reasonable cost. We didn't think there would be any word of mouth advertising generated because of the picture.

In exclusive runs, we ran exclusively To Catch a Thief, Trouble With Harry, Rose Tattoo, Court Jester, Scarlet Hour, Birds and the Bees, The Man Who Knew Too Much, That Certain Feeling, and Proud and Profane.

In addition to that, we took two runs on two pictures, Desperate Hours and Anything Goes.

Those were all show cased in the last season.

Q. When you say two runs—well, let's start at the beginning of the first show case picture. Do you remember where these pictures were show cased?

A. Yes. To Catch a Thief played in the Paramount Theatre in Hollywood.

Desperate Hours was one we had two runs on. We were experimenting with the thought of going back to a downtown run and a run on Wilshire Boulevard. We tried it on Desperate Hours. [3002]

Q. What theatres did you play it in?

A. The Warner Bros. Theatre in Beverly Hills and the Orpheum Theatre downtown.

Trouble With Harry played in the Fine Arts Theatre in Beverly Hills. It was strictly an offbeat picture, and it is a small house with a small operating expense, and we felt we could generate some

(Testimony of Alfred R. Taylor.)

word of mouth advertising in that theatre with that particular picture.

Rose Tattoo played in the Warner's Beverly Theatre in Beverly Hills.

Court Jester played in the Paramount Theatre in Hollywood.

Anything Goes——

Q. I think as you go along it might reveal to the jury what you were trying to do with the pictures if you would start back there and tell us—you told us about the one offbeat picture. Tell us a little bit about the other pictures.

A. Well, *To Catch a Thief* was made by Alfred Hitchcock. It has Cary Grant and Grace Kelly in it. At least in my opinion there are two producers or directors in Hollywood whose name means something at the box office. One is De Mille and the other is Hitchcock. His pictures follow a certain pattern, story of suspense. They are well made. They are expensive pictures. We felt by exhibiting them at an exclusive run we would generate [3003] some word of mouth advertising and therefore it would help all the exhibitors and ourselves as well on down the line.

Desperate Hours was a gangster picture. It was a story of three escaped convicts who holed themselves up into a family home, modest American family, and take over the running of the house.

It was rather an offbeat story and another company had made a very similar picture, and I believe it was called *Night Holds Terror*, released it

(Testimony of Alfred R. Taylor.)

ahead of us, and it was actually the same basic plot. I believe it was based on an actual happening in Lancaster, California. They got quite a bit of publicity.

Q. Yours was a play in New York?

A. Ours was originally a novel and then a play and then a motion picture.

We also at that time, our home office, at least, had made a survey and they came to the conclusion that if you could spend additional money advertising in New York City, Chicago, Washington, D. C., Dallas and Los Angeles, that that advertising penetration would splash over into all other parts of the United States and that it would assist everybody in the United States, so we spent advance and first week here in Los Angeles \$34,000 advertising the picture.

Now, unfortunately, it happened to come along, [3004] I guess, in the wrong cycle. People didn't like the picture at that time, or no one came in any event, and the picture was a failure. Some day I think the picture will do business. [3005]

Trouble With Harry. I told you about that picture.

Rose Tattoo. We thought that we had an opportunity of winning the Academy Award and under the Academy rulings you must play a picture publicly in Los Angeles at least 7 days before January 1st. So, we opened the picture around the Christmas period in order to qualify for the Academy Awards.

(Testimony of Alfred R. Taylor.)

Then we continued to play it in the Warner-Beverly Theatre hopeful that the people that had the right to vote for the winner of the awards, why, they would go to the theatre and see the picture and vote favorably for our picture.

We did win some of the awards.

We then removed the picture out of the Warner-Beverly at the night of the Academy Awards and then released it into other theatres so they could take advantage of the publicity because of the awards we did win.

Court Jester. That was a Danny Kaye picture and he is not too successful at the box office. This was a fine picture. It cost a lot of money. We felt we had a good story. However, there is a problem with costume pictures from time to time. They are not usually as acceptable as other types of pictures and we felt if we ran the picture in one theatre we would create some favorable publicity for ourselves. [3006]

Anything Goes was a picture that we tried two runs on. We played it in the Pantages Theatre in Hollywood and the Orpheum Theatre downtown. It was again a very expensive picture with Bing Crosby and Donald O'Connor and Mitzi Gaynor. We had Cole Porter music. It was in Technicolor and again we felt that we would assist ourselves by playing it in two theatres.

Do you want me to continue through the rest of them?

(Testimony of Alfred R. Taylor.)

Q. Yes, continue through the rest of them.

A. *Scarlet Hour*. Well, *Scarlet Hour* was a little different. That was a picture with no one in it.

There has been a cry in our business for the last several years that what we need is new faces. So, the company came to the conclusion that if we had some people in whom they had the confidence or felt they had possibilities for the future, that if they could get a good story and an important director and put those people in a picture by themselves, that we would assist those people a lot more than we would if we put them in with a Martin and Lewis picture or a Bing Crosby picture where those people would only have a limited opportunity.

So, *Scarlet Hour* was the result of that thinking. No one was very anxious to play it, even though many of the exhibitors or the ones that have been crying for new faces for many years, but because there is no one to advertise it is a difficult [3007] picture to put over. So, we tried it in the *Pantages Theatre*, Hollywood, introducing the new faces.

We spent \$7500 advertising advance and first week and the theatre took in \$2400. So, that was an unsuccessful venture.

Birds and the Bees was a picture with George Gobel. We weren't sure how much Gobel meant at the box office. It was our opinion that it was an excellent picture. It was made many years before called *The Lady Eve*. At that time it was very successful and so we decided to put it in the Para-

(Testimony of Alfred R. Taylor.)

mount Theatre - Hollywood to introduce George Gobel to the fans of the United States.

That shows you how you can sometimes gain the wrong impression. We thought that George Gobel was a big town comedian and not a small town comedian. The amazing thing about this picture is that the smaller the town it goes into, the more business that it does. It was exactly the result—the results were exactly the reverse as we thought they were going to be.

The Man Who Knew Too Much was the second Hitchcock picture and the story is the same as To Catch a Thief, only cast was James Stewart and Doris Day.

That Certain Feeling is a Bob Hope picture. Up to a year ago Hope had three or four years of bad pictures and he was slipping very badly at the [3008] box office, and we finally made a picture called The Seven Little Foys, which happened to be an excellent picture. So we felt in order to assist Hope that we should play The Seven Little Foys in one theatre, hopeful that the word of mouth advertising would help us. It proved to be very successful.

So we come along this year with another Hope picture which in my opinion was a better picture than The Seven Little Foys but it hasn't as an attractive title. We weren't sure whether Hope had recovered yet and so we decided to put it in one theatre and tried to be sure we could put Hope back where he was before.

(Testimony of Alfred R. Taylor.)

Q. What theatre did you put it in?

A. Paramount Theatre in Hollywood.

The last picture, *The Proud and Profane* is now playing at the Four Star Theatre. It is a war picture with William Holden. It was made by Perlberg and Seaton. They are very important producers with us. They made *The Country Girl*, *Bridges of Toko-Ri* and we felt we would be better served by playing *The Proud and Profane* in one theatre.

Q. Now, you have described in 1950 and 1951 how you licensed your first subsequent run, the so-called 7 day availability.

What are the factors that you considered in determining in what areas you would license your so-called first subsequent run, the 7 day availability? [3009]

A. Well, the 7 day availability that generally existed in 1950-51, was in existence when I came here, but I analyzed it, which would be my job, when I came here.

And it is true here as of every place else throughout the United States that I have ever been assigned to, that a succession of runs is a success or one of the successes of our business—that you start in an area such as, say as an example, downtown Los Angeles, and then you go out to the outer edge of that area.

In other words, to further points removed from the focal point, as I call it, which would be downtown Los Angeles, and you place the next run or

(Testimony of Alfred R. Taylor.)

availability, which would be 7 days, in the outlying areas.

Then you slowly week by week come in closer to the focal point.

Q. How do you determine which of the outlying areas to select?

A. Well, you do that by your individual opinion as to where the run should be.

Pasadena is a substantial community. Glendale is a substantial community. Inglewood and so forth and it was felt that a 7 day run would be reasonable in those situations—the most important sub-communities to Los Angeles.

Q. Did you attempt to provide a 7 day run for every theatre which happens not to be in [3010] substantial competition with some other theatre?

Mr. Corinblit: Object to that as leading and suggestive.

The Court: Objection overruled.

Mr. Mitchell: Could I have the question again, please.

(Question read.)

The Witness: No, because in our opinion in the Inglewood area one 7 day run is the proper way to distribute our pictures. We believe that one 7 day run, for example, in Pasadena, is the proper way to distribute our pictures after it has completed its Los Angeles engagement, because those theatres in those areas are important, too, even though they may be subsequent to the downtown or Hollywood theatres.

(Testimony of Alfred R. Taylor.)

They have their advertising penetration to the other areas surrounding the area in which the picture is playing. In other words, we believe a single run in Inglewood has its influence over Redondo Beach and Hermosa Beach and Torrance and Gardena—those little, smaller communities surrounding the Inglewood area and if the advertising is favorable, why, it will assist the exhibitors that continue to play thereafter because in addition to the fact that everybody can't come to the theatre in one given week, why, there is the matter of the admission prices and as the picture goes on down the admission prices go down, too, and we hope to play to every segment of the population. [3011]

Q. You say you thought that it was a proper way to license the Inglewood area—you say you thought that the proper way to have licensed the Inglewood area was with one run. I think you explained why you made two runs available. I think you should briefly tell us so now in order to relate it to what you are saying—why did you give two runs to that area—why did you make two runs available?

A. We made an exception in Inglewood because of the number of theatres that had come into being in a limited period of time, and that they were all substantial theatres with substantial operating expenses and in order to operate theatres properly with substantial operating costs, you have to have quality motion pictures. So with all of those theatres that had come into being, in our opinion, if

(Testimony of Alfred R. Taylor.)

we could add one run to the Inglewood area we would assist in solving that problem which we felt was existing.

Q. Why didn't you give another run to the Paradise like they wanted?

A. We didn't give another run to the Paradise. We permitted the Paradise to make an offer from all of the other theatres in that—all of the theatres in the area were entitled to make an offer for one of the two runs.

Mr. Corinblit: I object to that and move to strike the answer. It is not responsive. Mr. Taylor was asked why he didn't give the Paradise another [3012] run, and he didn't answer the question, and I will move to strike the answer.

The Court: Objection overruled.

Mr. Mitchell: I think I agree with Mr. Corinblit that you haven't answered the question.

Q. Why didn't you give—you were giving two runs down there and suppose the Paradise doesn't make enough of an offer to get the run, why don't you give them another run?

A. Well, because we had requests from exhibitors or at least the La Tijera, for the right to bid for our pictures in the Inglewood area, and it was our opinion that if we gave every exhibitor in there, in the area an equal opportunity, why, that is all that we were required to do.

Now, the question is not whether you give the Paradise one run. There are other people involved besides the Paradise. And as I explained the other

(Testimony of Alfred R. Taylor.)

day, it is like cutting up a pie. If you have two runs, why, you cut the pie in half. If you have three runs, you cut the pie in thirds and so forth. And it doesn't end only with the Paradise. There are other exhibitors in that area who have rights as well, so it would not only end up with two runs or three runs or four runs. If you gave every exhibitor the run they requested, they would all be playing day and date, so they would keep up with their competition, and as a result our pie would be cut so thin there would be nothing left and I don't believe the exhibitors could operate properly.

Q. In licensing your pictures first run Los Angeles and in licensing your pictures in the Inglewood-Westchester area, were you or your company engaged in any collusion or conspiracy or combination or agreement with Loew's or Warner Bros. or Universal or with Twentieth Century-Fox or, except for your licensing agreements with Fox West Coast, during this period 1950 to 1951?

A. No, we were not.

Mr. Mitchell: You may cross examine.

Cross Examination

Q. (By Mr. Corinblit): Mr. Taylor, you just answered a question by Mr. Mitchell to the effect that your company, neither you nor your company was in a conspiracy with the other companies in this area, in the Los Angeles area, and I want you to tell the jury what you meant by the answer—

(Testimony of Alfred R. Taylor.)

what you understood the meaning of the word "conspiracy" is.

A. What I meant—what was meant by the word "conspiracy"?

Q. Yes.

A. That all of the companies or Fox West Coast had banded together to conspire against someone.

Q. That is what you meant when you answered Mr. Mitchell's question? [3014] A. Yes, sir.

Q. Now, you were familiar with respect to first run in 1950 with how pictures were being played in Los Angeles, were you not? A. Yes.

Q. You knew not only what pictures—how pictures were being played by your company, but by the other companies as well?

A. Yes. I watched the newspapers every day.

Q. And during this time when Paramount, in 1950-51, when Paramount was playing its pictures primarily in the Paramount downtown, and Paramount-Hollywood first run—I will withdraw that.

Prior to the—and I will take the date from counsel, I think it is January 1, 1950, Paramount had an interest in the Paramount-Hollywood, is that right? Is the date January 1, 1950?

Mr. Mitchell: Yes. December 31st, prior to December 31, 1949, Paramount Pictures, Inc. owned some of the stock.

Mr. Corinblit: 50 per cent?

Mr. Mitchell: Yes, 50 per cent of the stock of Hollywood-Paramount Theatre Corporation which

(Testimony of Alfred R. Taylor.)

in turn had turned over the operation of the theatre to Fanchon & Marco, Inc.

Mr. Corinblit: As far as ownership of an interest in the theatre they——

Mr. Mitchell: It is just the way I said it. [3015]

Q. You knew that your company had an interest in the Paramount Hollywood Theatre Corporation prior to December 31, 1949, did you not?

A. Yes.

Q. 50 per cent interest? A. Yes.

Q. You knew that your company had an interest in the profits of the Paramount Downtown Theatre, is that correct, directly or indirectly? A. Yes.

Mr. Mitchell: When? Prior to any time we are concerned with here.

Q. (By Mr. Corinblit): Prior to December 31, 1949? A. Yes.

Q. All right. During this time, Mr. Taylor, that is turning now to 1950 and 1951, you knew that there were Warner theatres in the city, did you not, theatres in which Warners had an interest, is that correct?

A. Yes, I understood they had.

Q. These Warner's theatres never tried to get first run pictures from Paramount in 1950 and 1951, did they?

A. Not to my knowledge.

Q. You knew there were Fox West Coast Theatres in Los Angeles at that time, did you not?

A. Yes. [3016]

(Testimony of Alfred R. Taylor.)

Q. And Fox West Coast never tried to get Paramount pictures in 1950 and 1951, is that right?

A. No. We were exhibiting our pictures in the two Paramount theatres under the franchise.

Mr. Corinblit: I move to strike that out as not responsive.

Mr. Mitchell: Well, your Honor——

The Court: Denied. The answer was no and then he explained the no. But you are talking about first run pictures now?

Mr. Corinblit: Yes, sir, first run Los Angeles.

Q. You knew there were RKO theatres in Los Angeles in 1950 and 1951, did you not?

A. Yes.

Q. During that time the RKO theatres never sought to get Paramount pictures first run in Los Angeles, isn't that right?

A. Not to my knowledge, but again we were serving the two Paramount theatres under the franchise.

Q. Now, in 1950 and 1951, there were United Artists Theatres in Los Angeles, were there not? That is the Loew's State downtown and the Egyptian in Hollywood?

A. I don't recall whether they were operated at that time by United Artists or by Fox West Coast.

Q. All right. You recall whoever operated them did not try to get Paramount pictures first run [3017] during that period, isn't that correct, 1950 and 1951?

(Testimony of Alfred R. Taylor.)

A. I am trying to recollect in the downtown area. We had some requests to bid for our pictures in the downtown area, and I believe that request came from RKO. I mentioned that a moment ago, RKO did not endeavor, but I believe at one time around at that time RKO asked for the right to bid for our pictures downtown.

Q. You don't know whether that was after September or before, do you?

A. No, I am not sure.

Q. Mr. Taylor, during the same period you did not offer Paramount pictures to Fox West Coast, did you?

A. We were exhibiting our pictures under a franchise——

The Court: You can answer that yes or no.

Q. (By Mr. Corinblit): Did you offer them to Fox West Coast?

A. We had none to offer.

Mr. Mitchell: On first run you are talking about?

Mr. Corinblit: On first run.

The Witness: We had none to offer.

The Court: You can answer that yes or no.

Mr. Corinblit: May that answer be stricken, your Honor?

The Court: It may go out.

Mr. Mitchell: May he not explain, your Honor, after he answers? [3018]

The Court: After he says yes or no.

Mr. Mitchell: I think what they want you to do

(Testimony of Alfred R. Taylor.)

is answer yes or no and then if you want to explain, you can.

Q. (By Mr. Corinblit): Did you offer them to Fox West Coast? A. No.

Q. Did you offer them to Warners?

A. No.

Q. Did you offer them to RKO?

A. No. In each case it was because we were exhibiting our pictures in the two Paramount theatres under the franchise that was in existence.

Q. You did not offer them to United Artists Theatre Circuit either, did you?

The Court: He did not offer them to anybody. He will testify he did not offer them to anybody.

Mr. Corinblit: Yes, your Honor. But let's get this in the record.

Q. Is that right, Mr. Taylor?

A. United Artists? As I said, I don't recall whether United Artists was operating those theatres at that time, but if it will help, we did not offer them to United Artists downtown or the Egyptian Theatre in Hollywood, which was generally known as the United Artists Theatre.

Q. You knew at the same time that you weren't [3019] offering your pictures to these theatres, that Universal was playing in the Fox houses, isn't that right? A. Not necessarily.

Mr. Mitchell: Playing in the Fox houses, your Honor——

Mr. Corinblit: All right.

Mr. Mitchell: There were quite a few Fox houses.

(Testimony of Alfred R. Taylor.)

Q. (By Mr. Corinblit): You knew at that time, Mr. Taylor, that Universal was playing its pictures in four Fox West Coast theatres and the United Artists Theatre downtown, and was not offering its pictures to any independent exhibitor, isn't that correct?

A. I don't know that to be so. Universal has quite a number of pictures. I think they would offer them to a number of theatres to secure liquidation for the number of pictures that they had.

Q. My question is whether you know one way or the other. The play-off is in the record. If you don't know, all you have to do is say you don't know.

A. I wouldn't know unless I looked at the record and saw what happened to all their pictures.

Q. With respect to Loew's pictures, you know that the Paradise Theatre was not offered any Loew's pictures in 1950 and 1951, don't you?

A. Not to my knowledge, no. [3020]

The Court: How would he know what Loew's did to the Paradise?

Mr. Corinblit: Well, your Honor, your question is based on the assumption that these people didn't know what the others are doing.

The Court: He said no. He understood the question, evidently. I don't know, but I don't know how he would know what Loew's was doing.

Q. (By Mr. Corinblit): Now, you referred, Mr. Taylor, to the fact that your company had a franchise, is that right? A. Yes.

(Testimony of Alfred R. Taylor.)

Q. Now, did you testify that during this period—I will withdraw that.

You knew, of course, that this franchise agreement was not an exclusive agreement, didn't you?

A. No, I did not.

Q. You did not know it?

A. No, I did not.

Q. When Judge Westover made such a ruling, that it was not exclusive, did you offer your pictures immediately to the Paradise Theatre?

A. No, we did not, because even though Judge Westover determined that the franchise was not exclusive, he also determined that the clearance provisions of the franchise were fair and reasonable, as I recall the words, and even though [3021] the franchise within itself did not state the word exclusive, the fact remained that the clearance provisions embodied in the franchise automatically gave the Paramount theatres clearance over all the other theatres in the metropolitan area.

Mr. Corinblit: May I have the franchise agreements?

Q. I will show you Defendant Paramount's Exhibit H-1, H-2 and H-3, I believe, which are in evidence. Now, turning to H-1, which is the franchise of the Partmar Corporation, will you show me the language in this exhibit which you state prohibited you from playing any other theatre in the Los Angeles area on a day and date first run?

A. If it would help any, it has been several

(Testimony of Alfred R. Taylor.)

years since I have read this. I don't know where it is.

Q. I don't remember the section.

A. Do you want me to sit here and look for it?

Mr. Mitchell: The clearance provision is on page 22 under paragraph fourteenth B.

The Witness: 22?

Mr. Mitchell: That applies to the first year, and then there is another provision that makes the first year continue throughout the period of the agreement. You have to put several together. This is a lawyer's job, not a layman's job, to interpret this agreement. In fact, Judge Westover is the expert on it. [3022]

The Witness: I believe that 14-A begins to describe the clearance, and B gives you the provisions of the clearance. Shall I read part of it?

Q. (By Mr. Corinblit): Go ahead.

A. The same clearance accorded by Paramount to the exhibitor during 1938-1939 release year, subject to such changes as may be mutually agreed upon in writing between the parties thereto from time to time.

Q. Now, let's talk about this provision that the clearance is to be the same as it was in 1938-1939. You came here in what year?

A. 1945, March.

Q. Somebody told you what the clearance was here at the time, is that right?

A. Yes. I would say the bookers or the sales-

(Testimony of Alfred R. Taylor.)

men in the office. I had to get acquainted with it because that is my job.

Q. They told you what the clearance in 1938-1939 was in order for you to know what the franchise meant?

A. No. If I came here in 1945, I believe I went over the clearances as they existed.

Q. As they existed in 1945?

A. That's right.

Q. Under the franchise agreement, I think you testified yesterday or on Friday that the downtown Paramount had the right [3023] of clearance which would have prevented an additional run in the Inglewood area, isn't that right? A. Yes.

Q. In other words, under the agreement you weren't supposed to do that?

A. That is correct.

Q. But you did it, is that right?

A. Well, it isn't clearly stipulated as to the number of runs, but it has been—was historically so, that there was one run. [3024]

Q. All right.

A. So we felt there was a slight violation by putting in two—a calculated risk.

Q. You took a calculated risk by a slight, what you describe as a slight, violation? A. Yes.

Q. Now, under this agreement that you have described Paramount also had the right that—or, rather, the downtown theatre had the right and agreed with Paramount, that you couldn't license any other theatres in the Los Angeles area day and

(Testimony of Alfred R. Taylor.)

date with the Paramount Downtown and Paramount Hollywood, isn't that right?

A. That is correct.

Q. Now, you made another slight variation, didn't you, when you let the Fox Theatre in San Pedro play day and date with Downtown Hollywood, isn't that right?

A. Fox Theatre in San Pedro?

Q. Yes, the Cabrillo Theatre.

A. Well, that goes back to a time during World War II when pictures were being exhibited in Los Angeles for an extended period of time.

Q. May I interrupt you, Mr. Taylor? I know you want to explain but I will ask you, if you will, to answer the question first and that is that you did permit the San Pedro Theatre, the Fox Cabrillo in San Pedro, to play day and date with [3025] Downtown Hollywood and Paramount Hollywood—strike that. To play day and date with Paramount Downtown and Paramount Hollywood and that that was a breach of the agreement. Can you answer that question yes or no?

Mr. Mitchell: That calls for a legal conclusion of this witness and I don't know that he is qualified to tell whether the contract was breached by the San Pedro play. As a matter of fact, maybe the viewpoint of lawyers is otherwise.

The Court: Are you making an objection?

Mr. Mitchell: I am objecting on the ground that it calls for a conclusion of the witness.

The Court: Objection sustained.

(Testimony of Alfred R. Taylor.)

Q. (By Mr. Corinblit): You understood that Paramount Downtown and Paramount Hollywood had the right to insist that no other theatre play day and date with it. That is what you just said, isn't that right?

Mr. Mitchell: Just a minute. I object to that on the ground it calls for a conclusion. I mean if we are going into that kind of interpretation of the agreement we had better take the agreement itself. It is in evidence.

The Court: Objection overruled.

The Witness: I would say in the Metropolitan area, yes. But you are not defining each city. If you want to go over each city——

Q. (By Mr. Corinblit): The question is—the [3026] fact is you then did have the San Pedro Theatre, a Fox theatre playing day and date with Downtown Los Angeles and Hollywood, isn't that correct? A. Yes.

Q. All right. Now, under this agreement it was also true that the Paramount Downtown and the Paramount Hollywood had the right and Paramount agreed that at this time they would have——

Mr. Mitchell: What time—which time?

Q. (By Mr. Corinblit): Have clearance over Wilmington in 1948-49. The agreement, Mr. Taylor, was in force at that time. In other words, they had 21 days over Wilmington, didn't they?

The Court: Who is "they"?

Mr. Corinblit: Paramount Downtown and Paramount Hollywood.

(Testimony of Alfred R. Taylor.)

The Witness: I don't recall what clearance they had over Wilmington. I don't know why Wilmington should be listed in there, actually, because Wilmington followed San Pedro, so it would automatically follow.

Q. (By Mr. Corinblit): All right. Now what was the clearance of Paramount Downtown—what was the clearance in 1938 and 1939 of the Paramount Downtown and Paramount Hollywood over Wilmington?

Mr. Mitchell: Object to that as immaterial. We are way outside of the area. [3027]

The Court: What is the purpose of this?

Mr. Corinblit: Mr. Taylor testified the reason that he didn't permit us to play day and date under the franchise was because the franchise prohibited it. And I am showing now that Paramount did what they wanted to do under the franchise if Fox was involved.

We already have had testimony that San Pedro was permitted to play first run day and date with Downtown Paramount and Hollywood Paramount.

The Court: Objection overruled.

Q. (By Mr. Corinblit): Now, Mr. Taylor, you don't know—you know, don't you, that in 1938 and 1939, which is referred to in the franchise, there was clearance, 21 days clearance over all theatres in the city of Los Angeles, isn't that right?

A. Yes.

Q. And Wilmington is in the city of Los Angeles.

(Testimony of Alfred R. Taylor.)

A. Well, it wasn't agreed to in that sense, I believe. I never felt it meant in that respect. Wilmington is a part of the San Pedro area as we define it, so if San Pedro plays on a certain availability Wilmington comes automatically in behind.

Q. You know that Wilmington is a part of the city of Los Angeles?

A. Well, I don't—— [3028]

Q. In a legal sense.

A. You don't do everything on boundaries.

The Court: At that time was it a part of the city of Los Angeles? It may be now.

Mr. Corinblit: Yes. Mr. Mitchell, you will stipulate that Wilmington was a part of the city of Los Angeles in 1948-49?

Mr. Mitchell: Not in the meaning of the words used in this agreement.

The Court: Within the meaning of the city limits.

Mr. Corinblit: Within the meaning of the city limits.

Mr. Mitchell: I think it was.

Mr. Corinblit: You think it was.

Q. All right. Now, is it your testimony, Mr. Taylor, that there was some different definition of the city of Los Angeles other than the city limits in the clearance agreement? A. Yes.

Q. There was?

A. Yes, that Wilmington—you know as well as I do that this town is spread over a very vast area and the problem as to whether Wilmington was

(Testimony of Alfred R. Taylor.)

within the city of Los Angeles or whether it was not would not enter into this problem because Wilmington followed San Pedro.

Q. When you came here?

A. Yes, but you don't know what it was doing in 1938 and '39, do you? [3029]

A. No.

Q. As a matter of fact, you really do know because what you looked at when you came here was the Blue Book, didn't you, the Fox West Coast Blue Book?

A. No, I did not.

Q. You did not look at the Blue Book?

A. No.

The Court: Mr. Corinblit, it is exactly 3:00 o'clock and you are resting at the right time.

Ladies and gentlemen of the jury, we are going to take another recess and again it is my duty to admonish you that you are not to discuss this case with anyone; you are not to permit anyone to discuss it with you and you are not to formulate or express an opinion as to the rights of the parties until the case has been finally submitted to you.

With that admonition we will now take a recess until 3:00 o'clock.

(Short recess.) [3030]

The Court: Stipulate the jury is present in the box?

Mr. Corinblit: So stipulated.

Mr. Mitchell: Yes, your Honor.

The Court: You may proceed.

Q. (By Mr. Corinblit): I think before the re-

(Testimony of Alfred R. Taylor.)

cess, Mr. Taylor, I asked you whether or not you had examined the Blue Book when you came here to Los Angeles. So the jury knows what we are talking about, I will show you Plaintiff's Exhibit 32-B for identification and ask you whether you understand this is the Blue Book, and that is the sense in which you answered my question.

Mr. Mitchell: I object to that, your Honor, upon the ground it is incompetent, irrelevant and immaterial. He didn't examine it and that is that.

The Court: Sustained. He said he never saw it, he never examined it.

Mr. Corinblit: Your Honor, I think we ought to give Mr. Taylor another chance.

The Witness: I did not mean to imply that I never saw the book. He asked when I came here to Los Angeles if I examined it, and the answer is no, I did not.

The Court: You did not examine it?

The Witness: But I have seen the book.

The Court: You just saw it and never examined it. [3031]

The Witness: Not when I first came to Los Angeles. I have seen the Blue Book and I have read the Blue Book.

The Court: Objection overruled.

Mr. Corinblit: Will you read the question, please?

(Question read.)

The Witness: Now, I have answered that.

The Court: Is that the Blue Book you understand counsel was talking about?

(Testimony of Alfred R. Taylor.)

The Witness: Yes, I believe it is. Just a moment. Yes.

Q. (By Mr. Corinblit): Now, as a matter of fact, all of the clearances referred to in the Paramount franchise agreement stem from the Blue Book, isn't that right?

Mr. Mitchell: I object to that upon the ground it calls for a conclusion of the witness.

The Court: Sustained. I don't think that is an issue in this case.

Mr. Corinblit: That is correct, your Honor. I am not making a broad issue in any sense of the Blue Book in this case, in no sense. What I am doing is developing a point, and still the point with respect to the franchise only and the Blue Book only as it relates to the franchise.

The Court: I will sustain the objection.

Q. (By Mr. Corinblit): Now, referring to the provisions in the franchise agreement which you [3032] testified meant that clearances were to be the same as those in effect in 1938 and 1939, it is a fact, is it not, that under the clearances in '38-39 there was no right on the part of the Fox Theatre in Wilmington to play 7 days after Los Angeles, isn't that correct? A. I do not recall.

Q. I will show you Plaintiff's Exhibit 32 for identification and ask you to examine page 24, which has the provisions for clearance with respect to San Pedro and Wilmington, and ask you if that refreshes your recollection that under the clearance provisions of the franchise in 1938-39, the Fox The-

(Testimony of Alfred R. Taylor.)

atre in Wilmington could not play 7 days after Los Angeles.

A. I don't know. I would have to go back and look at the actual 1938-39 clearance.

Q. I am asking you whether this refreshes your recollection. Will you look at it and then tell me whether it refreshes your recollection in that respect.

A. I don't recall.

Q. So this does not refresh your recollection, is that it?

A. I don't know whether the clearance in 1938-39 was off of here or not. I don't know.

Q. You don't know.

A. To me Wilmington and San Pedro are a sufficient distance away that they were in what I would call another area. [3033] Wilmington was contingent upon San Pedro and not upon Los Angeles. If San Pedro played earlier, then Wilmington following San Pedro had that opportunity. The problem was brought around by the fact that during the latter part of World War II, because business was so good in Los Angeles and Hollywood that the pictures were playing longer and longer as they were released, in other words, instead of getting two weeks or three weeks run of quality pictures in Los Angeles and Hollywood, we were getting four, five, six, seven, eight weeks run. The result was that the theatres in Long Beach were running out of pictures and they were asking from time to time for a move-up to fill this vacant time, and we were granting those move-ups, and as we

(Testimony of Alfred R. Taylor.)

granted them to Long Beach, why, San Pedro is contingent upon Long Beach, so San Pedro automatically moved up. That is a problem that arises in our business from time to time.

Q. Now you have switched to Long Beach, Mr. Taylor.

A. Because you talked about San Pedro, and San Pedro is contingent upon Long Beach.

Q. Let's get this clear now. A. Yes.

Q. You played San Pedro day and date first run Los Angeles, and that was a Fox theatre.

A. Yes, but I told you the reason why was because it stems from Long Beach, not San Pedro in itself. [3034]

Q. You played Long Beach with Los Angeles and those were Fox theatres, isn't that right?

A. Yes, plus what is known as the Arthur or Cabart Theatres, of which Fanchon & Marco, some of them are part owners in the Cabart Theatres. I don't know exactly what the breakdown is.

Q. But the theatres that regularly play first run Long Beach were Fox houses.

A. Because outside of Arthur they were the only people operating first run.

The Court: You can answer that yes or no.

Mr. Corinblit: I move to strike the answer.

The Court: It may be stricken. You can answer that yes or not.

The Witness: Yes, but they were the only people operating the first run theatres outside of Cabart.

(Testimony of Alfred R. Taylor.)

Q. (By Mr. Corinblit): When you moved up San Pedro, and you moved them up to day and date first run, that was a Fox house, and you moved up Long Beach Fox houses to first run, you were doing that in the face of the provisions of the franchise, were you not?

A. Yes, and I explained why.

Q. But when the Paradise came and asked you for first run in the Westchester area, you refused to permit the Paradise Theatre to move up to day and date first run, and you gave them as [3035] your reason the franchise, didn't you?

A. I don't believe the Paradise or the Picwood or the La Tijera can in any stretch of the imagination be compared with San Pedro. The problem is entirely different.

Mr. Corinblit: I move to strike that out.

The Court: It may go out. Please read the question, and you pay attention to the question. Read the question.

Mr. Mitchell: The witness can explain his answer, can he not?

The Court: Yes, but he can answer the question first. Read the question.

(Question read.)

The Court: Now you can answer that yes or no, and when you answer, you can explain your answer, if you wish.

The Witness: Yes, we did, but I don't consider that the Paradise Theatre or the La Tijera or the Picwood or the Baldwin or the Crown Theatre in

(Testimony of Alfred R. Taylor.)

Pasadena or those type of theatres that asked us for first run to be in the same class with the situation in San Pedro or Wilmington or Long Beach.

Q. (By Mr. Corinblit): Mr. Taylor, you know the Paradise area, don't you? A. Very well.

Q. We never have actually put down the distance. Do you know what the distance is from the [3036] Paradise to the Hollywood Paramount?

A. No, I do not recall what it is.

Mr. Westbrook: I will offer you a stipulation, counsel. It is approximately 10 miles.

Mr. Corinblit: 10 miles.

Mr. Westbrook: Is that stipulation acceptable?

Mr. Corinblit: That stipulation is acceptable, subject to correction.

Q. Now, Mr. Taylor, have you any idea how many people from the Paradise go to the Hollywood Paramount? A. No.

Q. Have you any idea how many people from the Paradise go to the downtown Paramount?

A. No, I do not, but exhibiting those pictures in our show case theatres, it is our opinion that they draw some amount of people from all of the area surrounding Los Angeles. [3037]

Q. You don't know—as a matter of fact, you don't know if there are five people or 50 people, do you? A. No, I do not.

Q. Now, you likewise don't know how many people come from San Pedro, do you?

A. No, but based upon my experience in the business, it would be my opinion that there would

(Testimony of Alfred R. Taylor.)

be a lesser number than there would be from the Westchester area.

The further away you get from the focal point, the less patronage you get.

Q. And you don't know how many people come from Long Beach to the first run downtown or Hollywood theatre, do you?

A. No. My answer would be the same as it pertains to San Pedro. It is comparable to the other situations that are closer.

Q. Now, as a matter of fact you not only refused—you testified in this case that you refused the Paradise the privilege of playing first run Los Angeles.

Now, as a matter of fact, you refused other theatres that were—other non-Fox theatres the right to play first run with Los Angeles, didn't you?

A. Yes, I believe I mentioned them.

Q. And all the others that you refused to permit to play day and date were non-Fox persons asking for first run, isn't that right? [3038]

A. I believe that is so, but we had to determine, for instance, in the case of the Picwood, we considered them to be competitive with the Village Theatre and the Bruin Theatre in Westwood, which was competitive to Fox. So, we commenced bidding in that area originally, giving them an opportunity to play the Fox runs.

In Pasadena the Crown Theatre—the request was from the Crown Theatre and Fox also operated the Academy Theatre, and when the Crown

(Testimony of Alfred R. Taylor.)

Theatre opened, we gave them an opportunity to bid for the run that Fox formerly had.

Q. But you refused them the right to play first run?

A. Yes, because of the existence of the franchise.

Q. Because of the existence of the franchise?

A. Yes, sir.

Q. You refused non-Fox defendants the right to play first run but it was all right to permit Fox defendants to play day and date first run?

A. It doesn't make sense.

Q. I agree with that.

A. I am saying that your question doesn't make any sense for the reason that the request came from non-Fox houses.

Now, Fox did not have all of the first runs. Fox made no request to play our pictures first run in Inglewood or Pasadena or Westwood. So if the requests only came from non-Fox houses [3039] we turned the requests down based upon the franchise and not because of the theatres or who the owners were.

Q. But when Fox requested the Long Beach Theatre have first run and the San Pedro Theatre the first run to play day and date, you did that even though the franchise prohibited it, isn't that right?

A. Well, I attempted to explain the situation in Long Beach. Each situation is different and if they ran out of pictures, if Long Beach—and it wasn't only Fox. The Arthur people were running

(Testimony of Alfred R. Taylor.)

out of pictures, too, and in my opinion that was a reasonable solution to the problem with which we were faced.

Q. You testified, I think, that—what was it, approximately in June or September of 1952 that you went—that you began to play multiple day and date? A. July 9, 1952.

Q. July 9, 1952? A. Yes.

Q. Now, I think you testified that under this arrangement that you worked out all exhibitors in each one of these areas surrounding the urban core had a right to compete for first run pictures?

A. I believe that they would all be included. I mean—I don't know—you tell me the area that you are referring to. [3040]

Q. I am excluding what you have described as the urban core.

A. Well, you may be a little—there may be a little question about the area out in East Los Angeles, around Belvedere Gardens and Whittier. That was excluded. We called that "No man's land."

Q. And your company was the first one to do that?

A. On the basis that we are now operating.

Q. As a matter of fact, Mr. Taylor, to your knowledge no one has ever—no one ever permitted independent theatres in this city to compete for first run pictures in the Los Angeles area prior to the time you did it in July of 1952, isn't that right?

A. You mean on a multiple basis?

(Testimony of Alfred R. Taylor.)

Q. Yes.

A. There was no multiple system in operation.

Q. So no independents were ever permitted to compete for first run in those areas?

A. Neither were Fox or Warner Bros. or anyone else.

Q. Then your answer to my question as far as independents were concerned, they were not permitted to play first run, is that right?

A. That is right, as far as we were concerned. The runs weren't in existence.

Q. You say the runs were not in existence?

A. Were not. [3041]

Q. You knew, however, of course, that Universal was playing first run in the Culver area?

A. I didn't consider that a multiple run as far as that is concerned. That is their business.

Q. You don't consider two or three theatres playing, or three or four theatres playing day and date to be multiple first run?

A. No. I believe they took a group of theatres and put them together as best they could.

I believe that our plan has some semblance of intelligence and reasoning and it is entirely different.

Q. Mr. Taylor, do you remember testifying before the Subcommittee of the Select Committee of Small Business?

A. Yes.

Q. In Los Angeles?

A. Yes, I do.

Q. I want to call your attention to your testimony at page 238 where you are describing what

(Testimony of Alfred R. Taylor.)

you mean by "multiple run," and I want you to read that answer, the one that is marked with a check.

A. You mean for me to start right here, "Now, Mr. Arthur——"?

Q. Yes.

The Court: Read it to yourself. [3042]

The Witness: Oh, read it to myself, pardon me.

The Court: Don't read it out loud.

The Witness: Yes.

Q. (By Mr. Corinblit): Now, does that refresh your recollection, Mr. Taylor, that what you meant and what you mean by the term "multiple first run" is three or four theatres playing together?

A. Well, that is an area in Long Beach you are talking about.

Q. If it is an area in Long Beach, your meaning of the words "multiple run" is that if three or four theatres playing together, that is multiple first run?

A. No, I would say in Long Beach—Long Beach is a much smaller town than Los Angeles, and to me four runs in Long Beach is a multiple number of runs because it is a very small town comparable to Los Angeles.

Q. Now, your meaning before this House Business Committee was that three or four theatres in Long Beach is multiple first run, but if you are talking about three or four theatres playing day and date in Los Angeles, that is not multiple first run?

(Testimony of Alfred R. Taylor.)

A. That is right. I think that Universal put a group of theatres together as best they could work out with Fox.

Q. What do you understand by the meaning of the word "multiple"? [3043]

A. Multiple to me is an intelligent—we organized the term, as far as I know.

Q. You originated the word "multiple"?

A. I mean applicable to our plan. I don't recall as it was ever referred to before in our business because multiple runs were not in existence in the United States.

The Court: The question wasn't what you understood by "multiple first runs," but the question was, what do you understand by the word "multiple"?

The Witness: The word "multiple" as I understand it applied to our system——

The Court: Not when it applied to anything. What does Webster say "multiple" means?

The Witness: It means a group—a multiple number.

The Court: More than one?

The Witness: Yes.

Q. (By Mr. Corinblit): By the way, Mr. Taylor, when some of these other non-Fox defendants asked you for first run, you told them you wouldn't let them play first run and you gave them more than one reason. In other words, you told them, "A"—"You can't play first run because of the franchise," and "B"—"You can't play first run

(Testimony of Alfred R. Taylor.)

because we want a showcase.” Isn’t that right? Isn’t that what you told them? A. No. [3044]

Q. You didn’t say that?

A. To whom are you referring?

Q. Let us talk about the Picwood. When the Picwood asked you for first run you told them they couldn’t play first run and you gave them more than one reason why they couldn’t?

Mr. Mitchell: If we are going to have a conversation, I think we should know who were there and when it was and what was said and so forth. I object because there is no foundation.

Q. (By Mr. Corinblit): You signed an affidavit in which you gave more than one reason for not selling to the Picwood?

A. I wouldn’t recall.

Q. You don’t recall?

A. No, I don’t recall.

Q. You don’t recall signing an affidavit in the Picwood case?

A. Yes, but I don’t recall it.

Q. We may be able to get that before tomorrow morning and we will go into it at that time.

Now, as a matter of fact, Mr. Taylor, this multiple first run—your policy of first run has proved to be very successful for Paramount, has it not?

A. It was more successful in the earlier period of time than it is today, generally speaking, because [3045] we had a change in our type of product.

Q. That is to say, when you went to it in 1952 it was quite successful?

(Testimony of Alfred R. Taylor.)

A. I would say in 1952 it was quite successful.

Q. And in 1952, do you remember if you did much in the way of one theatre showcasing in 1952?

A. I don't recall. I would have to look at our release schedules.

Q. You don't recall whether you did or not?

A. I say I would have to look at the release schedules. I will be very willing to look at it tonight and tell you in the morning.

Q. All right. Now, I think you testified before that one of the reasons you went to first run—multiple first run was this matter of drive-in theatres. Is that right? A. Yes.

Q. That was one of the factors?

A. Yes, sir.

Q. That you took into consideration the matter of multiple first runs? A. Yes, sir.

Q. When did you say the drive-in theatres had all the physical facilities which would qualify them to play on an earlier availability?

A. I don't believe I said because I actually don't know. [3046] I say it progressed over a period of years—each year they improved.

Q. Well, the progress—

A. The fact remains that we had a franchise that did not expire until 1952 so we could do nothing about multiple runs at that time.

Q. But the drive-ins were qualified to go into first runs at least as early as 1950, weren't they?

A. I don't recall. It may be so.

(Testimony of Alfred R. Taylor.)

Q. And the reason for that is, as far as this business of inside speakers and good lenses with good light, that was all established by 1950, was it not?

A. No, I wouldn't say that it was at all. I don't think they have solved their entire problems yet, but they are improving all the time.

Q. Well, they had inside speakers in 1950?

A. Oh, yes.

Q. And they had good light in 1950?

A. No, they still have a problem, Mr. Corinblit, in our opinion, in the projection of motion pictures. They never get on to the screen. For example, in the Century Drive-In the quality of the picture, as far as it is photographed as would be in the case of the Paradise Theatre.

Q. Mr. Taylor, you are not saying that as of July, 1950, all these drive-in theatres got new [3047] projection equipment and got new lighting?

A. No, I am not endeavoring to say that at all. I am telling you that over a period of years there has been a continual progress in the drive-in operation and equipment, but they still have problems. They haven't eliminated all their problems.

Q. They had enough light in 1951 to qualify them to play first run pictures?

A. I would say yes. They have problems. For instance, in a black and white picture the drive-in has far more problems than in a Technicolor picture, because Technicolor pictures show up much better on the screen than black and white.

Now, it only has been in the later years that the

(Testimony of Alfred R. Taylor.)

vast majority of pictures from the top companies in this business have gone into Technicolor.

As you go back through the years there is less and less Technicolor productions.

Q. Now, you told the drive-ins prior to 1952 that they couldn't play first run, isn't that right, in Los Angeles?

Mr. Mitchell: Now, let us lay a foundation. I object to it on the ground no foundation has been laid. "You tell the drive-ins," that is people. Have him tell us what the people said.

Q. (By Mr. Corinblit): It was the policy of Paramount to refuse drive-ins in 1951 first run pictures? [3048]

A. We refused everybody first run pictures in 1951, not only the drive-ins.

Q. You refused the drive-ins, too?

A. I don't know that we refused them. I don't think they ever asked, if I recall correctly.

Q. Don't you know that all the film companies in this area refused the drive-ins any right to play first run?

Mr. Mitchell: I object to that on the ground no foundation has been laid.

The Court: Sustained.

Q. (By Mr. Corinblit): Mr. Taylor, I want to go back to this point of success of your 1952 operation.

You don't take the position that if one theatre in Hollywood and one theatre in Paramount played the picture day and date——

(Testimony of Alfred R. Taylor.)

Mr. Mitchell: You don't mean what you say. You said one picture in Hollywood and one picture in Paramount.

Q. (By Mr. Corinblit): One theatre in downtown Los Angeles and one theatre in Hollywood played pictures day and date and then a comparable picture is played multiple day and date, that all they do in a multiple day and date is divide up the patronage that the two theatres would have gotten, do you? You don't take that position?

A. I don't understand your question. [3049]

Q. Well, let's assume that the theatre in Hollywood and the theatre downtown grossed \$35,000 in a week.

A. Yes.

Q. When you play multiple day and date, you gross more than \$35,000 in a week ordinarily, don't you?

A. On a comparable picture?

Q. Yes.

A. You mean counting the 10 together?

Q. Yes.

A. Oh, yes, sure.

Q. There is no question about that.

A. No.

Q. In fact, you at times grossed as high as \$100,000 in the first week?

A. In 10.

Q. The picture Partners recently played, and what did that gross in Los Angeles?

A. The first week grossed 99,600 and some dollars, and the second week, if I recall, with nine theatres, it grossed 35,000. I may be off a thousand or two.

Q. You don't take the position that that gross in those two weeks would have been earned in the

(Testimony of Alfred R. Taylor.)

Hollywood Paramount and the Downtown Paramount if they had played the picture alone, do you?

A. No. I never intended to take that position.

Q. So it is not just a question of dividing up the patronage. You play multiple day and date to add to the first run patronage, don't you?

A. Yes, sir, that is our plan.

Q. The reason for that is evident, you add a new theatre in a new area first run, you make it more convenient and easier for people in each one of these areas to see the pictures, the admission price goes up and the people who are willing to pay more for first run will go there and you will get more patrons, isn't that right?

A. Certainly. That was our original plan. There is no mystery about our system. It wasn't caused by any stroke of genius. We were watching Barker Bros., Bullock's, the Broadway and other merchants of that type building stores in the outside areas. In other words, they were bringing, in our opinion, a greater amount of their merchandise to a greater number of their potential customers.

Q. All right.

A. So we arrived at more or less the same conclusion.

Q. Now, in 1950 and 1951, if you had added the Paradise Theatre as a first run theatre in Westchester, just like Fox had the first run theatre in the Loyola Theatre, you would have added revenue, first run revenue, to Paramount's treasury, would you not?

(Testimony of Alfred R. Taylor.)

A. I would question that very much, because [3051] for the reason it may have added to the treasury, but you have other areas where they were asking for the same provisions, and we had a franchise which was in existence, and we were of the opinion that we would be subject to litigation from Fanchon & Marco because we violated the franchise, so we may have added temporarily to our treasury, but paid it out in lawyers' fees and court costs.

Q. In other words, as far as income from the distribution of pictures, you would have added revenue to your treasury if you had let the Paradise play day and date first run with the Hollywood and downtown?

A. I would say if we added the Paradise, yes, we would have got more revenue, but that is not treating all the exhibitors in the area fair and proper.

Q. When you in 1952—perhaps you can remember back at that time when you finally went to this policy that you described, you went multiple first run on your best pictures or your middle bracket pictures, didn't you?

A. Well, we started off with The Greatest Show on Earth.

Q. Which was a great picture.

A. Which was show cased previously in the Orpheum Theatre downtown and in the Warner's Theatre in Beverly Hills. We naturally put our best foot forward. Actually, we juggled our releases

(Testimony of Alfred R. Taylor.)

around so that we would have four or five quality [3052] pictures so that we could establish the plan.

In addition to that, we were the only ones running on that basis and we were very important to the exhibitors in the area, because we were the only ones giving them a first run.

Q. And you put top pictures into that multiple policy, isn't that right?

A. Yes, but there has been a change, as I have told you, a change in the quality of our motion pictures. We are making what you might consider, as comparable to this year, we are making more adult entertainment than we were then. We had pictures such as *Naked Jungle*, *War of the Worlds*, *Far Horizon*, *Hell's Island*, *Whispering Smith*, that are pictures that are particularly adaptable for multiple run in our opinion.

Today we are making a different type of product, as I explained this morning, of all the pictures that were played exclusive.

Q. Didn't you testify yesterday that downtown theatres, it got to the point where the downtown theatres can only play action pictures and that type? Did you testify that way yesterday?

A. I said that the most successful pictures today in the downtown area are pictures of action and violence.

Q. And the real quality pictures aren't successful downtown at all? [3053]

A. Generally speaking, no. It all depends on each individual picture.

(Testimony of Alfred R. Taylor.)

Q. Quality pictures are more successful in the outlying areas than they are downtown.

A. No, no, not at all. I would say that the——

Q. Pardon me. I'm sorry.

A. It all depends on the individual picture. If you want to ask me about an individual picture, I will give an individual answer. It is not something that you can answer overall. After all, there have been pictures that are not pictures of action and violence that have been successful downtown, too. There are exceptions to the rule.

Q. I am not talking about the exceptions. I am talking about the general rule. When you say pictures of violence and action are the most successful pictures downtown, don't you mean that the other pictures of quality are more successful somewhere else other than downtown?

A. Well, I would say that a picture like *The Rose Tattoo* would be far more successful on Hollywood Boulevard or on Wilshire Boulevard than it would be downtown, if you wish to compare those areas.

I would say that certain types of pictures are far more successful on Hollywood Boulevard than they are on Wilshire Boulevard. One of the problems on Wilshire Boulevard is, for example, the matinee business is very poor. On [3054] Hollywood Boulevard, you have a finer matinee business.

So overall, generally speaking, you have a better success on Hollywood Boulevard than you do on Wilshire Boulevard.

(Testimony of Alfred R. Taylor.)

Q. Mr. Taylor, you remember that Mr. Schreiber and his son came to see you and asked you for first run pictures in about—first they wrote you a letter in February 1950, do you remember that?

A. I don't recall the date, but I recall the letter, yes.

Q. I will show you Plaintiff's Exhibit 1-A in evidence, which is the letter making the request of Paramount for first run.

A. Yes, I recall this letter.

Q. All right. Now, you sent a reply on February 9 to Mr. Schreiber in which you said: "This is in reply to your letter of February 6, 1950," and so forth.

"At the present time, we have franchises in existence, under the terms of which the Paramount Theatres in Los Angeles and Hollywood have the exclusive right to play our pictures first run in the Los Angeles area. We are, therefore, unable to comply with your request."

Yes, I recall that letter.

Q. The very next day, the very next day, while you were writing here in Los Angeles, Mr. Schwalberg, the president [3055] of your company was writing to Mr. Schreiber from New York, and he was saying this, Exhibit 1-B in evidence, talking to Mr. Schreiber.

"My dear Al:

"I have your letter of February 6 with copy of one addressed to our branch manager. I am requesting a complete report from Los Angeles and will

(Testimony of Alfred R. Taylor.)

communicate with you further as soon as I have had an opportunity to get the facts and give them consideration.”

A. Yes.

Q. You turned Mr. Schreiber down on February 9th when your president was saying he is going to consider the facts.

A. It so happened that the legal department attorney, Mr. Kaufman, was in Los Angeles at the time we received Mr. Schreiber's letter, and so we took care of the matter.

Q. You and the legal department took care of the matter without reference to the president of the company?

Mr. Mitchell: That isn't the president. That is the vice president in charge of sales.

The Witness: No.

Mr. Mitchell: Mr. Balaban was the president.

Mr. Corinblit: Mr. Schwalberg is listed on the document as being the president of Paramount Pictures Film Distributing Company. [3056]

The Witness: Mr. Schwalberg is president of Paramount Film.

Q. (By Mr. Corinblit): You say you and the lawyers decided this in Los Angeles.

A. Yes. Mr. Kaufman and Mr. Smith and Mr. Carman of O'Melveny & Myers and myself, we had a discussion over Mr. Schreiber's letter.

Q. Mr. Kaufman is a lawyer?

A. Yes, he is. He is our home office legal counsel.

Q. And Mr. Carman is a lawyer? A. Yes.

(Testimony of Alfred R. Taylor.)

Q. So that on February 9, 1950, as far as Paramount was concerned, you were consulting your attorney with respect to the Paradise request?

A. On what date?

Q. February 9, 1950.

A. Well, it might have been the day before or the day prior. I don't know.

Q. You consulted your lawyers, as a matter of fact, with respect to every letter you decided to write, didn't you?

A. Yes. We discussed with our lawyers any legal problem we have or any problem that involves clearances and availability in any situation in the territory.

Q. And you also discussed the matter of your making memoranda of conversation, didn't you?

A. No.

Q. You did not so discuss it?

A. No. The bidding situations are approved by Mr. Smith and myself and I handle them personally, and those memorandums are my own, and they are in existence for every bidding situation.

Q. When you received a letter from Mr. Lehman, you would send it to your lawyer immediately, would you not?

A. Oh, not necessarily. It all depended on what the letter was.

Q. I think we were talking about some memoranda earlier in the day. I ask you, with reference to your memoranda that Mr. Mitchell introduced in evidence, beginning with E-21 and E-22, E-31, E-35,

(Testimony of Alfred R. Taylor.)

E-37, E-36, before this time you had written to your attorneys with respect to the request made by Mr. Lehman after the picture *Born Yesterday* was played for the right to negotiate for your pictures on 7 day availability, isn't that right?

A. I wrote with a request to Mr. Lehman of clear 7 day run?

Q. No. You took Mr. Lehman's letter, when he asked you for 7 day availability, to negotiate for it, and you sent it to your lawyer in New York.

A. I don't recall. You would have to show me the letter. [3058]

Mr. Mitchell: Let me see what you are showing him, please.

Mr. Corinblit: Yes, sir. I think this is marked by you. We will mark this plaintiff's—

Mr. Mitchell: This is way back in April 1951.

Mr. Corinblit: Way back April 6, 1951.

Mr. Mitchell: Yes, and you jumped from 1950 to 1951, and I just wanted—

Mr. Corinblit: We will mark as Plaintiff's exhibit next in order a memorandum from Taylor to Kaufman dated April 6, 1951, a letter.

The Clerk: 86 for identification.

(The document referred to was marked as Plaintiff's Exhibit No. 86 for identification.)

Q. (By Mr. Corinblit): I will show you Plaintiff's Exhibit 86 for identification and ask you if that refreshes your recollection that you sent Mr. Lehman's letter to your attorney in New York.

A. Yes. [3059]

(Testimony of Alfred R. Taylor.)

Q. And you told your attorney in New York that you understood that a lawsuit was to be filed on behalf of the Paradise Theatre, did you not?

Mr. Mitchell: If you want to read the letter into evidence—if you want to introduce the letter, that is one thing, but there isn't any record here that he talked with his attorney. I suppose he sent the letter.

Q. (By Mr. Corinblit): Does that refresh your recollection that you wrote to your attorney in New York and told him that you understood a lawsuit was to be filed?

Mr. Mitchell: I object to the last part of the question on the ground the letter is the best evidence. If he wants to use the letter he may do so.

The Court: The letter is the best evidence. The objection is sustained. You can read the letter if you wish.

Mr. Corinblit: There will be another time, because it doesn't fit in with the time schedule here.

Q. (By Mr. Corinblit): But, Mr. Taylor, after you sent a copy of the letter to Mr. Kaufman—that is, when did you have any discussion about the making—strike that.

Did you have any discussion about the making of a memorandum? A. No.

Q. You had no discussion about the making of a memorandum at all? [3060]

A. No. You can go through all the records and all the bidding situations and the memorandum is identical.

(Testimony of Alfred R. Taylor.)

Mr. Corinblit: I don't seem to be able to put my hand on the particular memorandum that I want.

Q. Mr. Taylor, I want to turn for a minute to your circle plan. A. Yes.

Q. The first circle you drew was between the Paradise—around the Paradise, Loyola, La Tijera and Centinela Drive-In.

A. That is because I started over at one end.

Q. All right. Why did you draw that circle just around those theatres?

A. When do you mean, today?

Q. No, in 1950.

A. In originating the plan?

Q. Yes.

A. Well, it was our plan to attempt to arrive at some conclusion of playing two runs in Inglewood simultaneously, and the circle plan was the best plan that we were able to devise.

Q. Well, why did you draw this circle around only these theatres and not around the other theatres? For example, why didn't you draw your circle to go around the downtown Inglewood houses, your first circle? [3061]

A. Well, because we felt that the Paradise, Loyola and Centinela and La Tijera, plus those downtown houses, the Ritz, Fox, United Artists, the Academy and the Fifth Avenue were all in substantial competition if they were playing the same picture.

However, we were trying to devise a plan to sell two runs in the Inglewood area rather than one, so

(Testimony of Alfred R. Taylor.)

that seemed to be a logical conclusion, that we would take one run in the Paradise, La Tijera, Centinela or Loyola areas and one some place else.

Q. Well, now, why didn't you draw the first circle around all of the group of theatres? Why did you only draw one circle around these four theatres?

A. Well, I just finished explaining it to you. In my opinion we were going to take two runs and of the many plans that we had tried to devise that seemed to be the most intelligent.

In fact, we asked all of the exhibitors in the territory if they could come up with a better solution to the problem. And if they could we would be very happy to consider it and that included Mr. Schreiber of the Paradise.

Q. Now, under your plan, just looking at the first circle. A. Yes.

Q. If the La Tijera won the picture it would get [3062] clearance over the Paradise, isn't that right?

A. The La Tijera was awarded the picture—if the La Tijera was awarded the picture they would have clearance over all of the theatres in their own circle, which included in that case the Centinela, the Paradise, the Loyola, the Fox and the Ritz and the United Artists, the Academy and the Fifth Avenue.

Q. Well, let us talk about these things circle by circle, if you don't mind.

A. You can't talk about them circle by circle because that is the basic problem. That is just like

(Testimony of Alfred R. Taylor.)

leap-frogging or any clash—they clash one with the other.

Q. All right. Let us talk about the Paradise for a minute. A. All right.

Q. If the Paradise won the picture it would get clearance over the La Tijera?

A. That is correct.

Q. And no other theatre, isn't that right?

A. Well, it shouldn't be said in that sense—"no other theatre."

Q. Other than the Centinela and the Loyola if they are involved.

A. That is right, but it permitted the Academy or the Fifth Avenue or the Fox or the Ritz or the United Artists to [3063] play day and date with the Paradise, but if we awarded it to one of those theatres in the second circle it gave the Paradise a like opportunity.

Mr. Corinblit: I move to strike the answer as non-responsive. I am asking a simple question. I am asking simple questions one by one.

The Court: It may go out.

Q. (By Mr. Corinblit): Now, Mr. Taylor, just this question: If the Paradise won the picture it would get clearance over the Loyola, the La Tijera and Centinela and no other theatre, isn't that right?

A. That is correct.

Q. It would get clearance—strike that. It would not get clearance over the theatres in downtown Inglewood—the Fox, United Artists and Inglewood.

(Testimony of Alfred R. Taylor.)

A. They would not, but, contrarywise, they would not get clearance over the Paradise.

Mr. Corinblit: May the second portion go out?

Mr. Mitchell: That explains the thing.

The Court: The latter part may go out. It wasn't necessary to add the latter part of the answer.

Mr. Mitchell: Your Honor, I don't see how you can understand asking and requiring a witness to answer the question yes or no when a plan is as complex as this is. It does not get to the truth, and I think he should be allowed to explain. [3064]

The Court: He was asked what was the effect upon the Paradise Theatre, and he wasn't asked about the effect upon any other theatre at all. It was a voluntary statement.

The Witness: It has an effect on the Paradise Theatre, your Honor, because it allows the Paradise to play free and clear also. [3065]

* * * * *

Q. (By Mr. Corinblit): Mr. Taylor, I have two preliminary matters I want to discuss with you.

You testified yesterday on direct examination about Paramount in 1952 wanting to follow the examples—that is, it was only in 1952 that you decided to follow the examples of decentralization including things like following the department stores.

You mentioned Bullock's. I wonder if you had the same decision about following the department stores like the Broadway?

A. Yes. We had the general idea that they were

(Testimony of Alfred R. Taylor.)

attempting to bring a greater amount of their potential merchandise to a greater number of their potential customers.

Q. Did you know that the Broadway was in Westchester in 1950 and 1951?

A. I don't believe they were. I believe it was Millirons, if I remember correctly, but there was no particular area involved.

We just noted that they were attempting to build in other areas.

Q. Now, with respect to this matter of substantial competition, Mr. Taylor, it is your opinion, is it not, and it was the opinion of Paramount as follows, that if on Hollywood Boulevard the Chinese Theatre was playing a Metro picture and the Paramount-Hollywood Theatre was playing a Paramount picture, those two theatres on the dates that those pictures were played opposite each other would not be in substantial competition with each other?

A. That is correct for the reason that in our opinion theatres are built on the basis that there is a substantial number of customers or enough customers to take care of both of them. [3071]

Now, it is true that the Chinese Theatre in Hollywood and the Paramount Theatre in Hollywood are a block apart. Right now one of those theatres is playing *The King And I* and the other is playing *That Certain Feeling*.

Now, you determine that you are going to a theatre. You may be standing between the two. So you

(Testimony of Alfred R. Taylor.)

make a choice as to which way you wish to go. Maybe you finally decide to go to see *The King And I*.

Now, we don't believe in that sense that those two theatres are in substantial competition because generally speaking they play more than one week and although on this particular occasion you chose to go to the Chinese Theatre and see *The King And I*, the fact remains that later in the week or next week you may decide to go to see *That Certain Feeling*.

So, we don't, in our opinion, consider those theatres to be in substantial competition if they are playing separate pictures. [3072]

Q. If the Loyola Theatre were playing a Fox picture and the Paradise Theatre were playing a Paramount picture on the same day, for the same week, it would also be your testimony, I am sure, that those two theatres would not be in substantial competition, isn't that right?

A. That is correct for the same reason.

Q. So that your position is and Paramount's position was in 1950 and 1951 that two theatres are not in substantial competition with each other, located one to three blocks away from each other, if they are not playing the same picture?

A. Not necessarily one to three blocks, Mr. Corinblit. Every situation is an individual problem.

Q. All right.

A. We attempt to determine the situation based upon the factors.

Q. Let's follow it through then. The Paradise

(Testimony of Alfred R. Taylor.)

Theatre, if it were playing a Paramount picture, and the Academy Theatre, if it were playing a Fox picture, would not be in substantial competition?

A. That is correct, in my opinion.

Q. And the Paradise Theatre, if it were playing a Paramount picture, and any theatre in downtown Inglewood or the La Tijera, were playing a Fox picture, would not be in substantial competition?

A. That is correct, in my opinion. [3073]

Q. And your same opinion is true with respect to the Paradise and the Southside, if they were playing different pictures?

A. That is correct.

Q. The same thing is true with respect to the Academy and the Southside, if they were playing different pictures, they would not be in substantial competition? A. That is correct.

Q. When you state that that was your opinion, that was the opinion and the policy of Paramount in 1950 and 1951, is that right?

A. Well, I don't know about—

Mr. Mitchell: There isn't any policy to be followed.

The Court: It is already answered that that was his opinion and the opinion of his company.

Mr. Corinblit: Thank you, your Honor.

Q. Now, turning your attention to the period in March 1950, March or April 1950, do you remember Mr. Schreiber came to see you and Mr. Smith about getting pictures for the Paradise Theatre, both on

(Testimony of Alfred R. Taylor.)

the first run, and if he couldn't have it on first run, on 7 day?

A. I don't recall the actual date, but I know we had two visits with Mr. Schreiber with reference to that problem.

Q. On the 7 day availability, you told him he would [3074] have to bid and you enumerated the theatres he would have to bid against?

A. That is correct.

Q. At that very moment, that is March or April 1950, the way in which pictures were being licensed, Paramount pictures, on the 7 day availability in the Inglewood-Westchester area, was that as far as Paramount was concerned, you had a bidding set-up, but only Fox was bidding for your pictures, isn't that right?

A. That is correct. We started the bidding system based on a request of the La Tijera Theatre. Then subsequently the bids reduced themselves to the fact that we were only getting bids from the Academy Theatre.

In April of 1950, the bidding commenced with severity again and we were getting bids from all of the theatres again.

Q. That didn't happen, that is, that didn't happen until the Paradise told you that they wanted pictures for 7 day availability, isn't that right? They told you about that in March, and this only happened in April, isn't that right?

A. I don't know anything about that, Mr. Corinblit. There is no doubt in my mind that the exhibi-

(Testimony of Alfred R. Taylor.)

tors in the Inglewood area had some understanding between each other to split product between them. Now, basically, I don't see anything wrong with that as long as those exhibitors are not discriminating against another exhibitor. [3075]

Personally, if I had my choice, I would prefer to go into Inglewood and choose a theatre in which I preferred to play my pictures and say, "I want to play my pictures in X theatre in Inglewood," because I believe that if I knew that I had a home all the time for my pictures in the same theatre, that I would be better served.

I believe the exhibitor would be better served, because it is important to the exhibitor that he have a consistent flow of quality product, and if he knew that he was always going to have Paramount pictures, he would be better off.

That is what I would choose to do if I had my way about it.

Q. All right.

A. But when you have one item and two or more people desire that item, then it is not possible to do that. The best way for us to keep ourselves out of any difficulties is to give all a fair and equal opportunity.

Q. Now, you say you have no doubt in your mind that as of that time there was a split of product among the exhibitors in the Inglewood-Westchester area on the 7 day availability, isn't that right?

(Testimony of Alfred R. Taylor.)

Mr. Mitchell: That time will have to be defined, because it didn't exist after April.

Q. (By Mr. Corinblit): As of the moment Mr. Schreiber walked into your office and asked you for 7 day pictures. [3076]

A. Mr. Corinblit, I don't know anything about that. It happened before Mr. Schreiber came in, to my recollection, and it was long before the Paradise Theatre ever opened.

Q. And it was in effect as of the time Mr. Schreiber discussed the matter with you in your office, isn't that right?

Mr. Mitchell: Let's fix the dates of these discussions. I see one memorandum in April 1950. It apparently was not in effect at that time. One memorandum shows there was a discussion with George Smith, Al Taylor, and Max and Alex Schreiber on April 12th. [3077]

The Court: May I ask this witness a question?

Mr. Corinblit: Yes, your Honor.

The Court: Assuming that you were convinced that in a community the exhibitors had gotten together and arranged for a split of product. Under those circumstances, as a distributor, what would you have done about it?

The Witness: Well, if they assigned me, if you might call it that, if the exhibitors assigned me to an inferior theatre and I objected to playing my pictures in that inferior theatre, I would refuse to sell them.

(Testimony of Alfred R. Taylor.)

The Court: You would just boycott the community?

The Witness: Well, I would make every effort to sell my pictures but if they were going to put me into an inferior theatre and my pictures in my opinion were entitled to play that theatre—if in my opinion my pictures were not entitled to play that theatre, I would just flatly refuse to sell them until they worked out some plan that gave me proper representation.

The Court: Supposing you went into a community and there were three theatres, and you determined in your own mind that the three theatres, the operators of those three theatres, had gotten together and agreed upon a split of product. You put your pictures out for bid. You only got an acceptable bid from one theatre. You gave them all an opportunity to bid but because they had an agreement among [3078] themselves only one theatre bid on your product. What could you do about it?

The Witness: Well, I could refuse to sell the picture, reject the bid. However, this is a barter business and each picture is sold separately and I would have to determine what I would do about it based upon the facts at hand.

If I felt that those three exhibitors were assigning me to a specific theatre and that was the best I could do, I may determine to take that deal. It all depends upon the individual circumstances.

In this particular situation my pictures were

(Testimony of Alfred R. Taylor.)

playing in the Academy Theatre and I had no objection.

I think the great danger in this is whether the exhibitors get together to discriminate against another exhibitor, but there is no evidence of this because the Paradise, if that is the theatre referred to, was not in existence at the time and, secondly, in April apparently these exhibitors had some sort of a misunderstanding and the bidding commenced again very spiritedly.

Q. (By Mr. Corinblit): Now, would you tell us, Mr. Taylor, what were the other terms of the split of product in the Inglewood area at that time?

A. I don't understand your question.

Q. What was the split? Describe it. You got Paramount product and where did the other pictures go? [3079]

A. I tell you I don't know where they all went.

Q. You didn't know that at that time?

A. No. I was getting my—I was sending out my bids and my bids were coming in only from the Academy Theatre.

Q. Only from Fox? A. That is right.

Q. United Artists wasn't putting in any bid?

A. Well, now, I couldn't say that they didn't put a bid in on every picture. I don't know. But generally speaking, going over the list of pictures for a period of time, I received only one bid in the main. Now, there may have been exceptions.

Q. And the La Tijera and the same thing was

(Testimony of Alfred R. Taylor.)

true—the same thing was true with respect to the La Tijera. They didn't bid?

A. No, not until April 1st.

Q. Until when did you say?

A. Around April 1st. We noticed that the bidding became quite spirited again.

The Court: When you say April 1st, was this April 1st before the Paradise Theatre was opened?

The Witness: Yes, sir.

Q. (By Mr. Corinblit): But it was after you had discussed with Mr.—it was after you had had certain correspondence with Mr. Schreiber about him wanting pictures for the Paradise [3080] Theatre, isn't that right? Because that correspondence began in February 1950?

A. Well, I don't know anything about that as far as the theatre was concerned. When the Paradise opened, we sent a request for offers like we did the others and he had an equal opportunity with all the rest of them.

Q. Let me show you again what I think you looked at yesterday, Exhibit A-1. A. Yes.

Q. Which is a letter of request to you for pictures for the Paradise Theatre on February 6, 1950? A. Yes.

Q. So that was the time when the Paradise asked you for pictures?

A. Yes, this was the first letter.

Mr. Mitchell: He asked for first run in that letter. Let him read the letter. It is first run and nothing is said about 7 days.

(Testimony of Alfred R. Taylor.)

Mr. Corinblit: If that is so, do you want to make some change?

The Witness: Does he say 7 days in here?

Mr. Corinblit: No. Do you want to make a change in your testimony?

The Witness: That is different. I thought it included both 7 days and first run. [3081]

The Court: May I insist, Mr. Corinblit, and the witness, that you do not overrun each other.

Now, we are having a lot of that, and we want our reporter to last out this case and he won't if you both talk at once.

The Witness: All right, sir.

Q. (By Mr. Corinblit): Let me show you, Mr. Taylor, Defendants' Exhibit—Plaintiff's Exhibit 69-B, the cut-off card of the Academy Theatre and call your attention to the picture played, Dear Wife.

A. Here it is right here.

Q. Yes. Dear Wife. That played in March, March 22nd to March 28, 1950.

Mr. Mitchell: I object to the question upon the ground when the picture played is immaterial with respect to—Mr. Corinblit is trying to develop—it is when the picture was bid for we are talking about and not months later when the picture played.

The picture may have been bid for back in January and played in March so the question is immaterial.

The Court: I don't think there is a question pending yet. I don't think Mr. Corinblit got the

(Testimony of Alfred R. Taylor.)

question out. If he did, I didn't understand the question.

Q. (By Mr. Corinblit): Mr. Taylor, the question is, *Dear Wife* played March 22nd to March 28, 1950, did it not? [3082] A. Yes, sir.

Mr. Mitchell: I object to that as being immaterial.

The Court: Objection overruled.

Q. (By Mr. Corinblit): Now, the picture *Paid In Full* played May 19 to May 30—May 19 to May 23, isn't that correct? A. Yes.

Q. And that picture you sold on a flat rental of \$750? A. Yes.

Q. Now, Mr. Taylor, do you remember when Mr. Schreiber came to see you?

A. No, I do not exactly.

Mr. Corinblit: Will you stipulate with me the date on that was April 12th?

Mr. Mitchell: That is right. It was April 12, 1950.

Mr. Corinblit: Thank you.

Q. Now, Mr. Taylor, having in mind that date when Mr. Schreiber came in to see you, did you tell him that in the Inglewood area there was a split of product involving Paramount pictures?

A. No.

The Court: Wait a minute. That is not right, Mr. Corinblit. There was no split of product as far as the distributors were concerned. The split of product we are talking about [3083] was a split of product on the part of the exhibitors.

(Testimony of Alfred R. Taylor.)

Mr. Corinblit: Now, your Honor, that I respectfully——

The Court: You say “a split of product.” Now, if you ask the question: Did you tell Mr. Schreiber that the exhibitors had gotten together and there was a split of product” from the exhibitors’ standpoint, the question would be all right, but now you are assuming that there was a split of product as far as Paramount is concerned and Paramount evidently said they thought about it and that it was there, but they went along with it. [3084]

Mr. Corinblit: Now, your Honor, I must respectfully say that this is a question for the jury to decide, I take it, and that is not the plaintiff’s position. There is no question about it that there was a split of product between the exhibitors.

The Court: The only thing I want, Mr. Corinblit, is I want you to ask a fair question, and I want you to insert in that question the elements. You have used split of product. You have included everything.

Mr. Corinblit: Well, now, your Honor——

The Court: Break it down into two questions, if you want to.

Mr. Corinblit: All right.

Q. Mr. Taylor, you did not tell Mr. Schreiber in April, 1950, when he came in to see you that there was, or just prior thereto had been some arrangement in the Inglewood-Westchester area between exhibitors affecting Paramount pictures?

(Testimony of Alfred R. Taylor.)

A. No. I would have no reason to tell him. In the first place——

Mr. Corinblit: I move to strike that portion of the answer, your Honor, after “No.”

The Court: Everything after “No” may go out.

Mr. Corinblit: Thank you.

Q. Now, Mr. Taylor, when did you first learn that Paramount product was subject to a split of product among the [3085] exhibitors in the Inglewood area? When did you learn that?

A. I don't actually know. I would say after a period of time, when four or five pictures were bid for and I received only a bid from the Academy Theatre, I would come to the conclusion that they had some sort of understanding between them.

Q. Now, you came to a conclusion that there was an understanding between what companies?

A. I don't know.

Q. What did you mean when you just said that there was an understanding between them? What did you mean by “them?”

A. The theatres to whom we were sending bid letters.

Q. That included what theatres?

A. All of the theatres we were sending bid letters to at that time.

Q. That included United Artists Theatre?

A. Yes.

Q. La Tijera, Imperial Theatre, did it not?

A. Yes, sir. As I said, that is nothing unusual

(Testimony of Alfred R. Taylor.)

in our business. That is a common everyday occurrence, and it is perfectly all right with us.

Q. You say it is perfectly all right with you? In your opinion, Mr. Taylor, do you think that a sliding scale terms for Paramount pictures on the 7 day availability are perfectly agreeable?

A. Well, as I told you, Mr. Corinblit, this is a barter [3086] business. There is no price established for anything and you negotiate with the exhibitor for whatever terms you can secure.

When the exhibitor makes you an offer, it then becomes your job to determine whether or not you will accept that deal.

I have no objections to a sliding scale in certain places. Sometimes I take the sliding scale when I don't care to take it, but I have arrived at the conclusion it is the best that I can do under the circumstances and it is better for me in behalf of my company to accept the deal which I can secure from an exhibitor.

Q. Was that your situation in the fall of 1949 and early 1950, that you were taking a deal from the Academy because it was the best you could do?

A. On what?

Q. On 7 day availability.

A. You mean on particular pictures?

Q. Yes. You have the cut-off card in front of you, Mr. Taylor. Just tell us whether you notice that the basic terms used for your pictures that the Academy gave you were 20 to 40 per cent sliding scale.

(Testimony of Alfred R. Taylor.)

A. Yes. I accepted that. In my judgment, it was the best deal I could secure for my company.

Q. Do you think that was fair and reasonable?

A. Well, I don't object to a sliding scale. I consider [3087] it to be fair and reasonable. Naturally, instead of 20 per cent, I would like to have 25 per cent, and if I had 25 per cent, I would like to have 30, and if I could have 30, I would like to have 35, but under the sliding scale we had an opportunity to earn, if the gross was good, so the sliding scale has its advantages and disadvantages.

Q. Did you have an opinion in 1949 and early 1950 that those terms, 20 to 40 per cent sliding scale, were fair and reasonable for Paramount pictures on the 7 day availability?

Mr. Mitchell: I object to that as being immaterial, your Honor. We are not trying 1949 and early 1950, whether Paramount got a good price or not. It is immaterial.

The Court: Overruled.

The Witness: Could I have the question again?

The Court: Read the question.

(Question read.)

The Witness: In my opinion when a deal is proposed to me, I either accept it or reject it. Even though the terms may appear to be unreasonable, in my judgment I have to decide whether I want the deal or whether I don't want it.

On Top of The Morning, which was a Bing Crosby picture, I was offered 20 to 40 per cent, and I was offered a percentage, I believe it was 50 per cent

(Testimony of Alfred R. Taylor.)

over the 40 per cent figure. To me it was a reasonable offer. I would like to have more, but I couldn't get it, so I took it. [3088]

Q. Then it was your opinion that the 20 to 40 per cent sliding scale was reasonable on your pictures in 1949 and 1950?

A. We always go on the premise we never get enough money for our pictures. I am trying to show you this is a barter business and someone has to make a decision. That is all the exhibitor would offer us. I have two choices. I can either sell him the picture or I can stay out of the town. He offered me the 20 to 40 per cent. In my opinion, the sliding scale in the Academy Theatre was reasonable. So I accepted the deal in my business judgment as in the best interest of the company.

Q. Do you know what factors went into the expense figure on which that sliding scale was based?

A. Our sliding scales with Fox have nothing to do with expenses. They are based solely on grosses.

Q. In 1949 and 1950, was that true?

A. It has been for years.

Q. It had nothing to do with expenses at all?

A. As I described, again this is only a barter business. The exhibitor attempts to build up his expenses as high as he possibly can. The exhibitor is always losing money and the distributor is always losing money in this business, I mean that is part of the parlance of the business. The conversations you have back and forth are always that. So the [3089] exhibitor in computing the sliding scale

(Testimony of Alfred R. Taylor.)

attempts as best he can to increase his expenses, because the more he increases his expenses, the higher the scale and the less we earn.

So in bartering between us, we attempt to reduce the scale as much as possible, and he attempts to keep it up as much as possible.

Q. My question to you, Mr. Taylor, was whether you know what elements of expense went into that sliding scale?

A. No, because I said our expenses are based on the—our scales are based on grosses, and we never look to the expenses.

Mr. Corinblit: I move that portion of the answer be stricken after the word “No.”

The Court: Denied.

Q. (By Mr. Corinblit): Mr. Taylor, when the Paradise people, when the people from the Paradise Theatre came to see you and had a conference, which was stipulated to be April 12, was it about that time that you promulgated what you called the circle plan? Is that right?

A. We devised that system as the most intelligent way to approach the problem that we had to face and meet.

Mr. Corinblit: I move to strike the answer as not responsive. My question, was it at that time you used the circle plan?

Mr. Mitchell: I would like, since the record shows [3090] otherwise as to date, I would like to have the witness check as to the date when the circle plan was put out.

(Testimony of Alfred R. Taylor.)

The Court: Well, let's strike the question and answer.

Mr. Corinblit: All right, sir.

The Court: Start all over again and establish the date.

Mr. Mitchell: Let's get the date of the circle plan, because it was not at that time. If you want to stipulate, as I did with you, as to the date of the conference, the date of the circle plan was in June, 1950.

Mr. Corinblit: Well, now, Mr. Mitchell, you know Mr. Taylor was telling Mr. Schreiber about the circle plan when he came in on April 12.

Q. Do you remember that, Mr. Taylor? You are the witness, so you testify. When were you working on the circle plan?

A. I don't know, but it was some period of time before. I don't recall exactly.

Q. In other words, it might very well have been in April, 1950?

A. Yes. Could have very well been.

Q. All right. Before I go on, there is one other thing I think I want to establish as of that time in 1950.

Mr. Mitchell: Which date? [3091]

Mr. Corinblit: April, 1950.

Q. (By Mr. Corinblit): As of that time, you were selling the Southside Theatre on the 7 day availability by negotiation, isn't that correct?

A. Well, I will have to refer to my memorandum.

(Testimony of Alfred R. Taylor.)

Q. All right.

A. According to our records, we sold the Southside a clear 7 day run from September, 1949 to February, 1950.

Q. To February, 1950? A. Yes.

Q. By a clear 7 day run, you mean a 7 day run by negotiation without bidding? A. Correct.

Q. Let's turn to this circle plan. Mr. Taylor, it would be correct, would it not, to describe the circle plan that you drew around the Paradise Theatre, Loyola, La Tijera and Century Drive-In, as a competitive circle? A. Not in that sense.

The Court: What do you mean by competitive circle? Let's get some definitions.

Mr. Corinblit: Your Honor, we will get to the definitions.

Q. I want to know if it is not a fact that you referred to that circle as a competitive circle.

A. No, I wouldn't say so. The problem was an overall [3092] one, Mr. Corinblit. All of the theatres in the Inglewood area, in my opinion, were competitive, and as far as I was concerned, I was solely responsible for the actions of the Paramount Company in Inglewood, and that is what we came up with.

Mr. Corinblit: Your Honor, I will move to strike the answer.

The Court: Let me just ask you a question. You say it is your opinion that the theatres were competitive in the Inglewood area.

(Testimony of Alfred R. Taylor.)

The Witness: That is correct, one upon the other.

The Court: Were they substantially competitive?

The Witness: If they were all playing the same picture in the great majority, yes. I would say that there is a question whether Southside and Paradise were substantially competitive, but that is not the problem in Inglewood.

The Court: I know, now. Wait a minute.

The Witness: All right.

The Court: My understanding is you consider all the theatres competitive, but they are not substantially competitive, unless they play the same picture at the same time.

The Witness: Well, that is true in our business. We don't consider theatres playing different pictures to be substantially competitive, because the theatres are constructed originally with the thought of being enough in number to take [3093] care of all the population.

The Court: If the theatres in any one of these circles were playing different pictures at the same time, you would not consider them competitive?

The Witness: No, sir. It is like the explanation that I gave once before.

The Court: I know, but I am trying to find out what you mean by competitive circle. That is what I am trying to find out.

The Witness: Could I explain by another business that possibly would illustrate with more clarity, if it is confusing to our business?

(Testimony of Alfred R. Taylor.)

Mr. Corinblit: Your Honor, I will——

Mr. Mitchell: He is asking the court a question now. Let's let the court permit him to explain.

The Court: Do you have any objection to permitting him to explain?

Mr. Corinblit: Yes, I do. At this time I would like to develop this in my own way, if I may.

The Court: All right, you go ahead and develop it in your own way.

Mr. Corinblit: Thank you, sir.

Q. This is a memorandum——

Mr. Mitchell: You understand, your Honor, he has only partially answered your question. He has been stopped [3094] from completely answering.

The Court: I understand, but attorneys sometimes resent the court trying to run the case for them, and maybe I do it too much. Mr. Corinblit wants to run his own case. I guess he has a right to run it.

Mr. Corinblit: There is certainly no resentment on my part, your Honor, but I would like to develop this point, if I may, in this way.

Q. (By Mr. Corinblit): I will show you, Mr. Taylor, Exhibit E-31 in evidence, which you testified, I think, was your memorandum. A. Yes.

Q. Now, E-31 reads as follows:

“Re Warpath, 7 days after first run Los Angeles, willing to accept two runs 7 day availability Inglewood from offers received. Mr. Smith approved forms of offer of Century Drive-In. In accepting this offer, unable to accept offer of Fifth

(Testimony of Alfred R. Taylor.)

Avenue, Centinela Drive-In, as they are in the same competitive circle. A. Yes.

Q. These are your words, aren't they?

A. Yes, sir.

Q. Same competitive circle. A. Yes, sir.

Q. Now, I want you to describe for me the theatres [3095] that were in the same competitive circle with the Century Drive-In, Fifth Avenue and Centinela Theatres.

A. Will you let me look at the map over there again? [3095a]

Q. Yes. You know those theatres, don't you? You know the competitive circle?

A. Yes, very well. Now, what is it you want to know?

Q. What theatres were in the same competitive circle with the Century Drive-In, the Fifth Avenue and the Centinela Drive-In Theatre or maybe there are two circles there.

A. There is two circles as it involves the drive-ins, but the theatres that are in the Century Drive-In circle are the Southside—not the Southside, pardon me, the Rio and the Imperial and the Academy and the Fifth Avenue.

Q. All right. Could we call that—well, just so we won't have any problem, let us call that "competitive circle No. 3."

And I am starting No. 1, the one over in the La Tijera circle and the second one, and I will call that No. 3. A. Yes.

Q. Competitive circle No. 3.

(Testimony of Alfred R. Taylor.)

Will you name those theatres again—well, I think we can agree on them. They are the Academy, Fifth Avenue and Century? A. Fifth Avenue.

Q. The Rio and the Imperial?

A. Century and the——

Q. Imperial. A. Rio and Imperial.

Q. Yes. Now, will you describe—name the theatres that are in the competitive circle No. 2?

A. No. 2?

Q. Right. All right.

Mr. Mitchell: Why don't you let him see the map so we will get it correct?

The Witness: The Academy, the Fifth Avenue, the Ritz, the United Artists, the Fox, the La Tijera and the Centinela Drive-In.

Q. (By Mr. Corinblit): The Academy?

A. Fifth Avenue.

Q. Fifth Avenue. A. The Fox.

Q. The Fox. A. The Ritz.

Q. Ritz. A. United Artists.

Q. U.A., Centinela Drive-In and the La Tijera.

A. And the La Tijera, right.

Q. Now, let us go to competitive circle No. 1. Do you want to take a look at the map?

A. No, I can recall those.

Q. I was sure you could.

A. There are only four of them. They are the Centinela Drive-In,—[3097]

Q. Competitive circle No. 1?

A. Paradise, Loyola, La Tijera and the Centinela Drive-In.

(Testimony of Alfred R. Taylor.)

Q. And finally competitive circle No. 4.

A. Was the Imperial, Rio and the Southside.

Q. Right. The Imperial, Rio and the Southside.

Now, what did you mean when you used the words "competitive circle No. 1," about describing a circle around the Paradise, Loyola, La Tijera and Centinela?

A. I don't exactly understand what you mean.

Q. Well, perhaps we can go a little further on that.

Turning to competitive circle No. 1——

A. Yes.

Q. ——if the Paradise won a picture it would get clearance only over the theatres in circle No. 1, is that right?

A. That is correct.

Q. It would get clearance only over the Loyola, La Tijera and Centinela?

A. Yes.

Q. It would not get clearance over any other theatre in competitive circle No. 2?

A. That is correct.

Q. Except the Centinela and the La Tijera in its own circle? [3098]

A. That is right.

Q. No theatres in competitive circle No. 3?

A. That is correct.

Q. And no theatres in competitive circle No. 4?

A. That is correct.

Q. Now, for the purpose of clearance, these competitive circles were drawn for the purpose of clearance, weren't they?

Mr. Mitchell: How are we using the term "clear-

(Testimony of Alfred R. Taylor.)

ance?" That is important because there isn't any clearance in this case.

Mr. Corinblit: Mr. Mitchell has been saying that but the only trouble the witnesses have been using the word "clearance." They have been using the word either "priority of run" or "clearance."

The Court: Let us ask the witness what he means by "clearance."

Mr. Corinblit: All right, your Honor. We will ask him in terms of documents so we will get it clear.

Q. Now, I will hand you Plaintiff's Exhibit 1-P-1, which is in evidence, and ask you if you recognize that signature as your signature, "A. R. Taylor." A. Yes, it is.

Q. And this is the letter that was sent out by you? A. Yes.

Q. All right. Now, I want you to look at the paragraph [3099] that reads as follows after you describe the plan—you described the four circles, did you not? A. Yes.

Q. And you say this: "The foregoing plan takes into consideration for the purpose of clearance——" A. That is right.

Q. "——those theatres which in our opinion are in substantial competition with each other."

A. Yes.

Q. Now, what did you mean by the word "clearance" as used in that sentence?

A. Well, it is probably not a proper statement. My definition of clearance is when a theatre closes

(Testimony of Alfred R. Taylor.)

the exhibition of a picture there is a lapse of time.

Q. May I stop you, Mr. Taylor.

Mr. Corinblit: Your Honor, may I move to strike the answer as non-responsive since I am asking the question what he meant by the term "clearance" in this sentence.

The Court: It may go out.

Mr. Corinblit: Thank you.

The Witness: Then I would say that "clearance" meant that the exhibitor had a priority of run or could play ahead of the following theatre.

Q. (By Mr. Corinblit): Thank you. That is what you meant by the word "clearance." All right. [3100]

Now, you say in this letter that "The foregoing plan takes into consideration for the purpose of clearance those theatres which in our opinion are in substantial competition with each other."

A. Yes.

Q. Now, you define clearance as including the element of priority of run.

Now, the Paradise had clearance or priority of run only over the Loyola, La Tijera and Centinela Drive-In, isn't that right? A. That is correct.

Q. So, therefore, you meant in that letter—you were saying in that letter that the Paradise was only in substantial competition with those three theatres. A. No, I didn't say that at all.

Q. Well, now, what did you mean, Mr. Taylor, when you said you were taking into consideration for the purpose of clearance—

(Testimony of Alfred R. Taylor.)

A. This is a general——

Q. Those theatres which were in substantial competition?

A. That was a general letter. It explained the plan for the Inglewood area which in my opinion is a sensible plan and is legitimate and as fair as we could come up with.

Now, you might think the plan that I devised stupid, but in my opinion, at least, it was honest and in the two years [3101] or so that we had the plan in effect we asked all the exhibitors in the area if they could come up with any other solution and none of them could.

This is a definition of our plan as best we could explain it to the exhibitors.

Mr. Corinblit: Your Honor, I move to strike that answer as non-responsive.

Mr. Mitchell: He is explaining what he meant, your Honor.

The Court: Motion denied.

Q. (By Mr. Corinblit): Now, Mr. Taylor, you drew some circles and you called them "competitive circles." Didn't you really mean when you were saying "competitive circles," didn't you really mean "substantial competitive circles?"

A. No. I did not mean that at all. We were simply attempting to solve a problem in Inglewood at the best means at our command and we came up with this circle system.

Now, as I said before, you might think it is stupid, but at least it is honest. Basically in my

(Testimony of Alfred R. Taylor.)

opinion I think there should be only one 7 day run in Inglewood and we had adhered to one 7 day run you wouldn't be asking me about that because we wouldn't have had two runs.

This was only an attempt upon our part to solve a product problem in Inglewood in taking two runs instead of one because of the number of theatres that had been added in [3102] Inglewood, and the plan was worked out as best we could work it out.

Q. Why didn't you put the Academy in the Paradise circle?

A. Why didn't we put the Academy in the Paradise circle?

Q. Yes.

A. Because we felt we should have two runs and they were sufficient apart that it wouldn't be unreasonable to have the Paradise and the Academy play day and date with two runs rather than one run in the area.

It is the best that we could come up with in the system that we developed.

Q. Now, Mr. Taylor, I am getting at your opinion in 1950 and not your opinion now.

A. I am not objecting, Mr. Corinblit. I said I am solely responsible for that system. I am **not** blaming anybody else—the home office or Mr. Smith or anybody else, and I can explain to you to the best of my ability.

Q. Now, with respect to your opinion in 1950, the fact is that in your opinion in 1950 the Academy was not in substantial competition with the

(Testimony of Alfred R. Taylor.)

Paradise and that is the reason you didn't include them in the Paradise competitive circle?

A. That is just not so. It is absolutely not so.

I consider the Academy and the Paradise in substantial competition. I always have and I still do. But as I told you [3103] before we were endeavoring to put two runs in Inglewood instead of one in an attempt to relieve a problem, and so we overlooked that problem—passed it by.

Q. Now, the fact is, not only with respect to the Paradise, Mr. Taylor, but with respect to each one of these competitive circles, a theatre only received clearance, including priority of run as you have defined it, over the theatres in its circle or circles, isn't that correct?

A. That is because we were taking two runs, Mr. Corinblit. Yes, that is true.

Q. That is true? A. Yes, that is right.

Q. And you used the language in your letter that you are taking into consideration for the purposes of clearance those theatres which "in our opinion are in substantial competition with each other." That is your language?

A. Yes, but I don't believe—doesn't it say something about the over-all problem in Inglewood?

Q. Well, I am referring to what you meant by that language, Mr. Taylor.

A. Well, I surely have been trying to explain it to you to the best of my ability.

I may be a knuckle-head but I am trying to show you that we had a problem in Inglewood, and we

(Testimony of Alfred R. Taylor.)

worked out this system as best we could. And as I say you may think it is stupid, [3104] but it is honest. That is one thing about it.

Q. Now, Mr. Taylor, under this circle plan, you notice this—that looking at the Paradise Theatre, the theatres over which it can obtain clearance are within about two miles of each other, is that right?

Mr. Mitchell: You are using “clearance” in Mr. Taylor’s sense?

Mr. Corinblit: Yes, that is right.

The Witness: I believe it is about two miles from the Loyola—I mean the Loyola and the Paradise to the La Tijera.

Q. (By Mr. Corinblit): If it played on the 7 day availability? A. Yes.

Q. Now, the Academy Theatre got clearance over the La Tijera, didn’t it? A. Yes.

Q. How far was that from the Academy?

A. Well, if I recall correctly, and I would be off only a few tenths of a mile, it is one and four or five-tenths miles from the Academy to downtown and I believe one and two-tenths miles to the La Tijera.

Q. So that is 2.6 miles? A. That is right.

Q. And the area over which the Academy got clearance to the south of it, to the Rio Theatre is how far? [3105]

A. I don’t recall exactly. I would say, just guessing, it would be around three miles.

Q. Three miles?

A. Something in that neighborhood.

(Testimony of Alfred R. Taylor.)

Q. But the theatre that got the most clearance as a matter of fact was the Academy, wasn't it?

A. I wouldn't say that.

Q. The theatre that got the most clearance over the most theatres was the Academy or Fifth Avenue?

A. Because they were mostly bunched in there. But if the Academy Theatre got clearance, it also meant that the United Artists and the Fox, the La Tijera and the Centinela had the same in that circle, other than the Rio and the Paradise.

Q. But the Academy got—the Fox Academy got clearance over more theatres than any other theatre in that circle, isn't that right?

A. Because there are more theatres in that circle.

Mr. Corinblit: I will move to strike the answer. You can answer the question "Yes" or "No," I believe.

The Court: It may go out.

The Witness: Yes, but there are more theatres in the circle.

Q. (By Mr. Corinblit): Now, when you set this plan up, Mr. Taylor, under the plan you put in—I will withdraw that. [3106]

Turning to the matter of prints for a minute. I think you testified that the prints, the black and white prints cost you somewhere between \$150 and \$200, or was there a larger figure than \$150?

A. I would say around—I don't know exactly,

(Testimony of Alfred R. Taylor.)

but I would say around from \$150 to \$250 at that time.

Q. Now, the average number of times that you use one print was about 70, wasn't it?

A. I would say that would be a fair estimate.

Q. So each print, the cost of each print per showing in terms of cost of the print was about \$2.00, isn't that right?

A. I don't know.

Q. Well, if you divide \$150 by 70, you get a little over \$2.00?

A. Oh, I see, yes. [3107]

Q. (By Mr. Corinblit): Per showing it is \$2.00?

A. Yes.

Q. Now, let's talk about your prints, Mr. Taylor. You had on the first run, when you started playing first run, I think you testified you had something like only 12 to 16 prints in the area generally.

A. What time are you referring to?

Q. 1950.

A. Yes, there were 12 to 15 or 16 prints, depending upon the quality of the picture.

Q. When you came to the 7 day run, would you pick up maybe five or ten prints?

A. It all depended upon the booking problem at that time. I would say sometimes yes and sometimes no.

Q. So that you might have on the 7 day availability, you might have as many as 25 prints in the office?

A. I would question that very much. It is possible, but I doubt it.

Q. Would you have as many as 20?

(Testimony of Alfred R. Taylor.)

A. I think that is a high number. I don't know. Each picture would be an individual problem.

Q. I think you testified under direct examination by Mr. Mitchell that on the first run when the pictures in 1950 and 1951 were playing day and date at the downtown and Hollywood theatres, and probably day and date in the San Pedro and [3108] Long Beach theatres, at the same time they were playing in other cities in the Southern California and Arizona territory, is that right?

A. Yes. I said we attempted to book them day and date in the towns where they had their own influence, their sphere of influence over the community, such as San Diego, Santa Barbara, Phoenix, Tucson, towns of that type.

Q. And that would include towns like Bakersfield?

A. Well, I can name them for you. Bakersfield, San Bernardino, Riverside, Pomona, Santa Ana, San Luis Obispo—I have left out a few, I imagine.

Q. Assuming that those prints opened up in those towns that you have mentioned, if they played a week, let's assume, also, the picture played a week first run, when they were through in Los Angeles and through in the other towns, you would hit the 7 day availability, wouldn't you?

A. Well, generally speaking, you find that in all of those towns you don't open at the same time, because they have pictures from other people. Sometimes they are a week late. Sometimes two weeks

(Testimony of Alfred R. Taylor.)

later. But we attempt to book them as quickly as we can along with the first run Los Angeles.

Q. Now, assuming that they were booked at approximately the same time. A. Yes.

Q. You would then hit the 7 day availability, isn't [3109] that right, after the first run?

A. That's right.

Q. You had all these prints and they were going on the 7 day availability, and when you came to the 7 day towns which were asking for prints at the same time that the Paradise Theatre was asking for prints for 7 day in the Inglewood-Westchester area, you were using prints for towns having a population as low as 2,000, while you were denying the Paradise Theatre a print, even though they had 40,000 people, isn't that right, within a two-mile radius?

A. Well, we didn't deny the Paradise Theatre the run because of their population. We denied it because we had a franchise in existence which in our opinion prohibited the Paradise Theatre from playing.

Q. Well, now, we are talking about 7 day availability.

A. I'm sorry. I thought you were talking about day and date.

Q. The question is whether at the very moment that you were denying the Paradise a print for a picture on the 7 day availability in Westchester, at that very moment prints were being used by your

(Testimony of Alfred R. Taylor.)

company on the 7 day availability in towns having a population as low as 2,000 people.

A. We didn't—

Mr. Mitchell: Just a minute. Wait a minute now. I object to that question on the ground it assumes a fact not [3110] in evidence. He says as a basis of his question that the picture was being denied to the Paradise. No such thing. There is no such evidence. In every instance the Paradise had a right to have that 7 day run, in every instance.

The Court: Maybe you'd better not use the word deny in your question. Substitute some other word.

Q. (By Mr. Corinblit): At that very moment that the Paradise was not playing 7 day availability in Inglewood-Westchester area, you were playing pictures on the 7 day availability in towns as low as 2,000 people, isn't that right?

A. Yes, but we were playing somebody in Inglewood on the 7 day availability, generally speaking, of which the Paradise had an opportunity.

Mr. Corinblit: Your Honor, I will move to strike everything after the word "Yes."

The Court: It may go out, everything after the word "Yes."

Mr. Corinblit: Thank you.

Mr. Mitchell: Your Honor, I don't see why he can't explain his answer. Mr. Corinblit is trying to create an impression here, and the witness has a right to explain his answer in such a way as to defeat the insinuation.

The Court: Mr. Mitchell, that's all we have been

(Testimony of Alfred R. Taylor.)

doing for the last 20 odd days, is trying to create an impression, [3111] an impression not upon the court, but upon the jury. I don't understand it. It is beyond my comprehension how this jury is going to remember all the facts and the figures and the immense detail of this case. They are going to decide this case probably upon impression, and that is what you have been trying to do, to create an impression upon the jury for your part, and Mr. Corinblit, also.

Mr. Mitchell: Then doesn't the witness have a right to explain his answer so as not to permit the jury to get the impression which he thinks is improper and which I think is improper, and not force him to answer a question yes or no, so he cannot explain his answer?

The Court: It is 11:00 o'clock and we will take our morning recess.

Ladies and gentlemen of the jury, again it is my duty to admonish you you are not to discuss this case with anyone, you are not to allow anyone to discuss it with you, and you are not to formulate or express any opinion as to the rights of the parties until this case has been finally submitted to you.

With that admonition, court will not stand in recess until 11:15.

(Recess.)

The Court: Stipulate the jury is present in the box? [3112]

Mr. Corinblit: So stipulated, your Honor.

Mr. Mitchell: Yes.

(Testimony of Alfred R. Taylor.)

The Court: Ladies and gentlemen of the jury, we have had a considerable difficulty in this case, as we do in all technical cases, on the question of definitions, words. We use words and we understand what we are saying. Other people may get a different impression as to what we mean.

For instance, in this case we have had a definition of substantial competition. This witness has given his understanding of what is meant by substantial competition. It differs considerably from the definitions as given by others.

You remember we had an expert on the stand the other day and he gave us a definition of what he meant by substantial competition.

It is one of these things that everybody in the industry understands and knows, but they can't explain.

So we have a great deal of difficulty in definitions, in determining the use of words or the meaning of words to be used.

Now, a little while ago when I was talking to Mr. Mitchell, I said that the jury is going to decide this case upon impressions. Well, that word impressions is subject to several different interpretations and I don't want you to get the wrong interpretation.

You are to decide this case upon the facts and the [3113] evidence, but you are the ones who are going to determine what the facts are and the inferences that can be drawn from those facts.

Now, you see the witness, you notice how he testifies, you notice his demeanor upon the stand. You

(Testimony of Alfred R. Taylor.)

get an impression from watching the witness as to whether or not you can rely upon his testimony, whether or not he has been contradicted in any way. It is an impression that you get that is perfectly legitimate as to the credence you can place upon the testimony of these various witnesses.

Now, you are to decide this case upon the facts, but from the facts you are to get the impressions I have been talking about. From hearing all the facts, you then come to a conclusion—let's not use the word impressions at all—you come to a conclusion, without being able to pinpoint it upon any particular one bit of evidence, but upon all of the evidence, that there has been or has not been a conspiracy, or there has or has not been any other question you are called upon to resolve.

So I don't want you to get the idea that you are not to decide this case upon the evidence. You are. But you are the ones that are going to evaluate the evidence, you are the ones who are going to determine whether or not, from all the evidence and all the circumstances, the testimony of all the witnesses, whether there has or has not been a conspiracy, and [3114] whether the plaintiff has or has not been damaged.

So I hope you don't get the wrong impression from my use of the word impression.

All right. You may proceed.

Q. (By Mr. Corinblit): Mr. Taylor, yesterday you testified about an exhibit, Defendant's Exhibit K. I would like to place Defendant's Exhibit K be-

(Testimony of Alfred R. Taylor.)

fore you. With respect to that exhibit—first, let me ask you this question.

In licensing your pictures, licensing Paramount pictures, the final approval of the contract is in New York, isn't that right, and was at this time?

A. With the exception of contracts involving bidding situations, the approval was actually in the right of Mr. Smith, who was then my division manager.

Q. But as far as actually having a contract—let's talk about negotiating, then, for a minute. Suppose a picture was negotiated, instead of bid, as far as having a contract, you didn't have a contract until it got to New York and was approved there, is that right?

Mr. Mitchell: Just a minute.

The Witness: That is not correct.

Q. (By Mr. Corinblit): You say that is not correct?

A. That is not correct insofar as bid situations are concerned. Regardless of whether a picture was bid for or negotiated, in a bid area the right of approval was solely in [3115] our office.

Q. In the bid area it was in your office. I take it that it was true, as far as Paramount was concerned, until you put your name or Mr. Smith put his name on the contract, you did not have a deal, is that right?

A. Actually, when the bids were received, I evaluated the bids and went into Mr. Smith, generally—he was not always in town—and we discussed

(Testimony of Alfred R. Taylor.)

it and arrived at a conclusion as to which of the bids we would take. We then generally notified the exhibitor by telephone, or told the booker, and he would contact the exhibitor and tell him he could book the picture, if he so desired.

Q. Let's talk about a situation where you negotiate a picture, and isn't this correct. Assume that a salesman negotiates a picture in the area. He discusses the matter with the exhibitor. He finds out what the exhibitor is willing to pay under all the circumstances. He comes back to you. If you approve the deal, you immediately thereafter send out a contract form to the exhibitor. He fills it out, sends it back to you, and you sign it here, and when you sign it, you have got a contract, is that right?

Mr. Mitchell: Well, now, that calls for a conclusion of the witness, your Honor. He just said he notifies them, and it may be, as a matter of law, as a matter of fact it is so as a contract when he notifies them. It calls for a conclusion [3116] of the witness.

The Court: What difference does it make?

Mr. Corinblit: This makes a difference in some examination I propose to carry out here.

The Court: Well, you are coming into another field in which everybody seems to know what they are talking about but there is quite a difference in opinion. I don't know when they had a contract. They might have had a contract if they said yes over the telephone, and they didn't have to have a signature. If you want to know if they had a for-

(Testimony of Alfred R. Taylor.)

mal agreement, yes. If there is a formal contract, then they didn't have a contract until after all the parties signed. But in the meantime the parties might have got certain rights that they could enforce through the law, even though the contract was never signed. [3117]

Mr. Corinblit: Well, I didn't want to get into an ambiguity problem if I can avoid it.

Q. (By Mr. Corinblit): I show you Plaintiff's Exhibit 69-B. A. Yes.

Q. Now, you have actually got a place on the form, 69-B—that is a Paramount record, isn't it?

A. Yes, sir.

Q. That is your company's record?

A. Yes.

Q. And on this form you have got some entries here—you have an entry called "date of contract," isn't that right? A. Yes.

Q. Now, what does that "date of contract" on your form mean?

A. That is the date that the girl typed the contract up and the date appears on the contract form itself.

Q. And then you have a line, "date approved."

A. That is right.

Q. What does that mean?

A. That means the date it was approved by the home office.

Q. Home office. In other words, you send these contracts pursuant to which an exhibitor gets a pic-

(Testimony of Alfred R. Taylor.)

ture? You send these contracts back to New York for approval? [3118]

A. Well, you must separate them, Mr. Corinblit. You must separate them. You have two situations.

You have bidding areas and you have non-bidding areas.

Now, we have no right of approval of any contracts negotiated in a non-bidding area, but we had the sole right to approve bids, no matter how they were disposed of, in bidding areas.

Q. Well, now, Inglewood-Westchester was a bidding area, was it not? A. That is right.

Q. And starting with 49 and 50 you were bidding during the time indicated by this cut-off card, which is a part of Exhibit 69-B, isn't that right?

A. That is correct.

Q. And your card and this cut-off card for 1949-50, and I will go to the '50-'51 season in a minute, has an entry for every single picture showing the date of the contract and the date approved, isn't that right? A. That is correct.

Q. So you follow the same procedure in this territory as you followed generally. You had a contract. You typed it up. You sent it to the exhibitor. He sent it back to you and you sent it to New York and it got approved, isn't that right?

A. That is correct. [3119]

Q. And that is what you did in the Inglewood-Westchester area in 1949-50 and in 1950-51?

A. That is correct, but the right of approval was

(Testimony of Alfred R. Taylor.)

in our office. We didn't have a separate form for bidding and the home office has to know what is going on, so we sent the contract through in the normal course of our daily routine, but the right of approval was solely in our hands and always has been.

Q. But turning to your contract form, and I will be glad to pull one out—is there a form here? I don't know. But you know that your form says that there is no contract unless it is signed in New York, don't you? That has been on your form for probably 35 years.

A. It is a standard factor that the exhibitor has a right to withdraw any deal prior to its approval.

Q. And under that form—as a matter of fact, it says there is no contract until approved in New York, isn't that right?

A. That is correct, but as far as the bidding situations are concerned—it was something new to us because nobody thought of changing it in so far as Los Angeles was concerned.

Los Angeles, I believe, was one of the two places in the United States where the bids were approved locally. The other was Chicago. [3120]

So, under our normal operation all bidding went into New York for approval with the exception of those two places.

Q. But you are not changing your testimony that the contracts which resulted from the bid went to New York for approval?

A. If they were bidding under normal circum-

(Testimony of Alfred R. Taylor.)

stances they went to the home office and they approved them, but they were approved by Mr. Smith and myself because our letters to New York show that—if you will get one of those letters that went to the contract department, it says that we discussed the matter with Mr. Smith and he approved the deal or the submission of the deal.

Q. Yes, I appreciate that, that your letters say Mr. Smith said it was all right, but you are not again changing the fact that the Paramount routine policy was to send out a form contract to New York for approval and that your form said that no contract would be binding until approved in New York, isn't that right?

A. That is right. I am not trying to deny that, but the fact remains that we approved them in our office and all the exhibitors know it.

Q. I would like you to turn to the picture September Affair and the picture Redhead and the Cowboy on your schedule, Mr. Taylor.

A. September Affair? [3121]

Q. Yes, and Redhead and the Cowboy.

A. Yes.

Q. Now, you remember, Mr. Taylor, that Mr. Lehman wrote you a letter on March 26, 1951. It is a letter in evidence as Plaintiff's Exhibit 3-B.

Mr. Mitchell: Will you show the letter to the witness, please?

Mr. Corinblit: Certainly.

Mr. Mitchell: If you are going to ask him about it.

(Testimony of Alfred R. Taylor.)

(Document handed to the witness.)

The Witness: Yes, sir.

Q. (By Mr. Corinblit): That was on what date? Do you have that there on the letter?

A. March 26, 1951.

Q. Now, shortly after you received that letter you called Mr. Lehman and told him that—you called Mr. Lehman and told him that those two pictures, September Affair and Redhead and the Cowboy, had been sold, isn't that right?

A. As I recall the conversation, yes.

Q. You do recall the conversation?

A. I say as I recall the conversation, yes.

Q. You told him that those two pictures had been sold? A. That is right.

Q. And therefore you denied his request to negotiate with you for those two pictures? [3122]

A. Yes.

Q. Is that right? A. Yes. [3123]

Q. Now, the exhibit that you have in front of you shows that those two pictures were sold to what theatres? You told him that they were sold to what theatres?

A. I don't know as I told him what theatres they were sold to, but the pictures were awarded to the Academy and the Southside—that is September Affair and Redhead and the Cowboy were awarded to the same theatres.

Q. How did the Southside get it?

A. They negotiated for it.

Q. Negotiated for it? A. Yes.

Nos. 15,450✓ and 15,680✓

IN THE
United States Court of Appeals
For the Ninth Circuit

WILLIAM R. RUSSELL,

Appellant,

VS.

WILLIAM CUNNINGHAM,

Appellee.

WILLIAM R. RUSSELL and ANNA

L. RUSSELL,

Appellants,

VS.

UNITED STATES OF AMERICA, et al.,

Appellees.

On Appeals from the District Court of Guam (No. 15,450) and
the United States District Court for the Northern
District of California (No. 15,680)

BRIEF FOR APPELLEES

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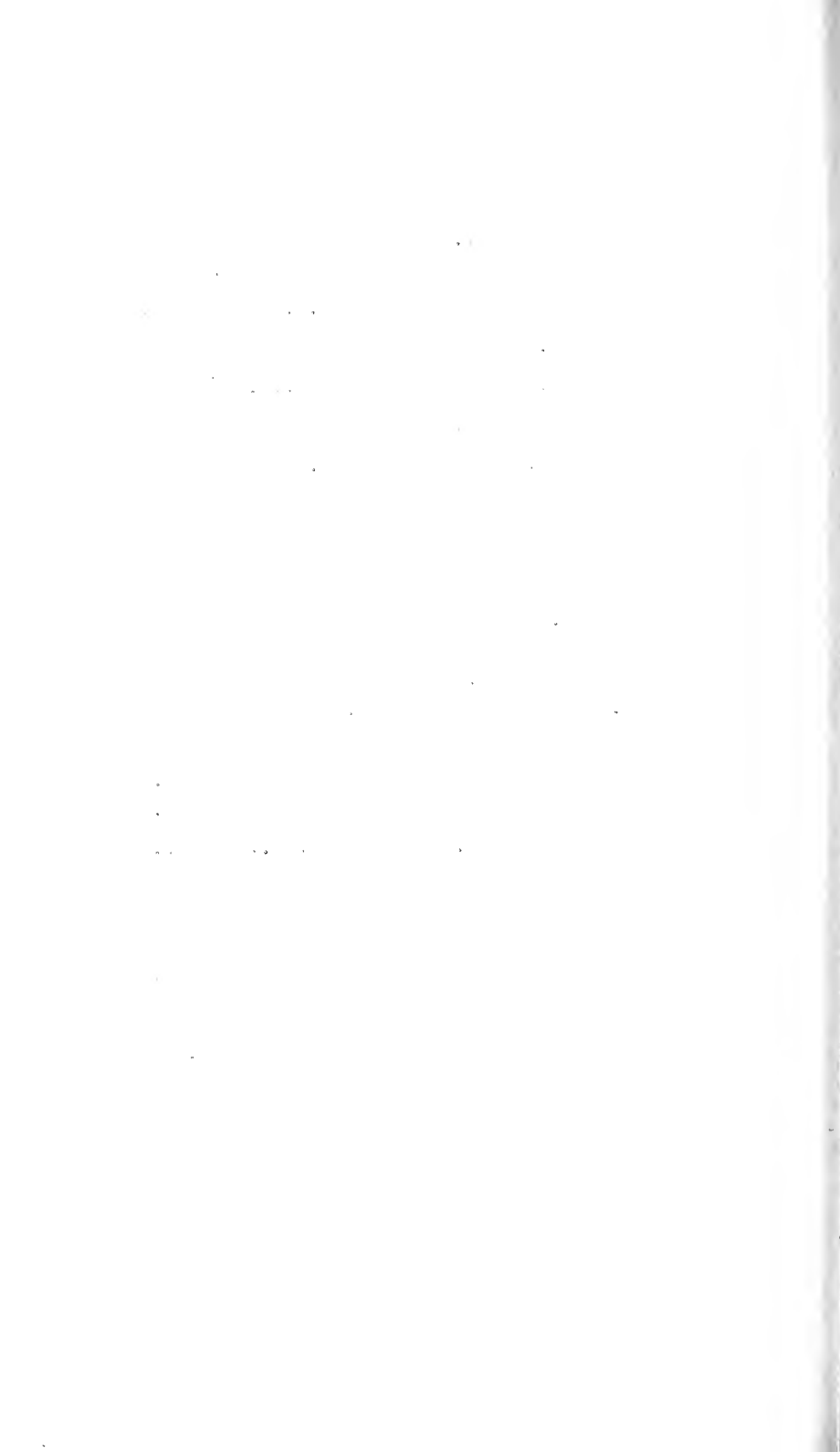
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Nos. 15,450 and 15,680

IN THE

**United States Court of Appeals
For the Ninth Circuit**

WILLIAM R. RUSSELL,
Appellant,

vs.

WILLIAM CUNNINGHAM,
Appellee.

WILLIAM R. RUSSELL and ANNA
L. RUSSELL,
Appellants,

vs.

UNITED STATES OF AMERICA, et al.,
Appellees.

On Appeals from the District Court of Guam (No. 15,450) and
the United States District Court for the Northern
District of California (No. 15,680)

BRIEF FOR APPELLEES

PRELIMINARY STATEMENT

By Order, dated October 16, 1957, in No. 15,680, the Court directed that both appeals captioned above be heard together. The Appellants have filed a single consolidated brief in both cases and the Court, by an Order filed October 7, 1959, captioned in both cases, provided for the filing by the Appellees of "their answering brief". Accordingly, to avoid confusion and

with a view to presenting in a single document a comprehensive view of this litigation, Appellees submit a consolidated brief upon the two cases, which concern the same subject matter.

The affirmance of the judgment below, on a previous appeal in the Guam action (No. 15,450), is reported in *Russell v. Cunningham*, 233 F.2d 806 (9th Cir. 1956). The dismissal of an appeal in a related case, referred to herein, is reported in *Russell v. Hackworth, et al.*, 233 F.2d 503 (9th Cir. 1956).

JURISDICTION

No. 15,450—The Guam Appeal

This is an appeal by Plaintiff-Appellant William R. Russell from an order of the District Court of Guam (Guam R. p. 158) denying a motion to set aside a judgment of dismissal for lack of prosecution.

The jurisdiction of the District Court of Guam was founded upon the Act of August 1, 1950, c. 512, §22, 64 Stat. 389 (as amended, 48 U.S.C. §1424) by virtue of a Complaint (Guam R. p. 1) filed April 26, 1954.

The jurisdiction of this Court is invoked under 28 U.S.C. §1291 by a defective Notice of Appeal (Guam R. p. 158), filed November 21, 1956, from the Order (Guam R. p. 158), filed October 26, 1956, denying a motion to set aside a previous judgment of dismissal. This Court is actually without jurisdiction, since the order appealed from is a non-appealable order.¹

¹*Hicks v. Bekins Moving & Storage Co.*, 115 F.2d 406 (9th Cir. 1940).

No. 15,680—The California Appeal

This is an appeal by Plaintiffs-Appellants William R. Russell and Anna L. Russell, his wife, from a judgment (Order of Dismissal, Cal. R. V. 1, p. 22) dismissing the Complaint and cause below.

The court below had no jurisdiction against Defendant United States for lack of consent of the United States to be sued.² If the court below had jurisdiction as to the remaining defendants, such jurisdiction must have been founded upon 28 U.S.C. §1331, by virtue of a Complaint (Cal. R. V. 1, p. 1), filed April 11, 1955, impliedly calling in question the exclusiveness of the Plaintiffs' remedy under the Federal Employees Compensation Act of September 7, 1916, c. 458, 39 Stat. 742 (as amended, 5 U.S.C. §751, *et seq.*), the principal point to be discussed in this brief.³

²28 U.S.C. §2680(h) and Federal Employees Compensation Act of September 7, 1916, c. 458, 39 Stat. 742 (as amended, 5 U.S.C. §751, *et seq.*).

³Although Appellants attempt to invoke diversity jurisdiction, they do no more than allege that they "reside" in California and that each Defendant is a "resident" of another state or territory. It has been a settled point from *Bingham v. Cabot*, 3 Dall. 382 (1798) to the present day that mere allegations of residence are not enough to confer jurisdiction upon the court. Moreover, Appellants have joined as defendants no less than 60 avowedly fictitious parties. This alone would be fatal to diversity jurisdiction. *Molnar v. National Broadcasting Company*, 231 F.2d 684 (9th Cir. 1956). Finally, Appellants have joined the United States as an additional party to those individual Defendants who are presumably citizens somewhere, although we are not told where. The United States is not a "citizen". *United States v. Dry Dock Savings Institution*, 149 F.2d 917 (2nd Cir. 1945); cf. *Postal Tel. Cable Co. v. Alabama*, 155 U.S. 482, 487 (1894) (state not a "citizen"). The only provision of the statute permitting additional parties in a suit between "citizens of different states" is 28 U.S.C. §1332(d)(3), which explicitly limits such additional and non-diverse parties to "foreign states or citizens or subjects thereof",

The jurisdiction of this Court is founded upon 28 U.S.C. §1291 by virtue of a Notice of Appeal (Cal. R. V. 1, p. 27), filed May 23, 1957, from a judgment (Order of Dismissal, Cal. R. V. 1, p. 22), filed April 26, 1957, dismissing the Complaint and cause below.

QUESTIONS PRESENTED

No. 15,450—The Guam Appeal

This appeal presents the questions:

1. Should this Court now depart from its numerous rulings that it is without jurisdiction of an appeal taken, as this one is, from a mere order declining to vacate or set aside a final judgment?

a limitation obviously excluding the United States. It is familiar doctrine that §1332 is to be strictly construed to restrict jurisdiction. *Thomsen v. Gaskill*, 315 U.S. 442, 446 (1942); *Indianapolis v. Chase National Bank*, 314 U.S. 63, 76 (1941). It requires no strictness to deny jurisdiction here where not only are the requisite allegations lacking but the Complaint affirmatively shows the lack of the necessary diversity and the Appellants admit (Cal. R. V. 2, p. 6, lines 5-13; Appellants' Brief pp. 46c-46d) that they do not know even the residences of the Defendants.

The Federal Tort Claims Act, also referred to by Appellants in the Complaint, confers no jurisdiction over Government employees or agencies, or organizations acting as agents of the Government. 28 U.S.C. §2679; *Benbow v. Wolfe*, 217 F.2d 203 (9th Cir. 1954); *United States v. Dooley*, 231 F.2d 423 (9th Cir. 1955). It thus confers no jurisdiction over Defendant Cliff House, an instrumentality and agent of the United States (Cal. R. V. 1, p. 11, lines 9-10) like officers clubs, post exchanges and other non-appropriated fund activities generally. See *Standard Oil Co. v. Johnson*, 316 U.S. 481, 485 (1942); *United States v. Forfari*, 268 F.2d 29 (9th Cir. 1959) cert. denied U.S.; *Falls City Brewing Co. v. Reeves*, 40 F.Supp. 35, 39 (W.D.Ky. 1941); *Maynard & Child v. Shearer*, 290 S.W.2d 790, 794 (Ky. 1956).

Although the Appellants specify no provision of the Constitution or Acts of Congress relied on for the federal question jurisdiction which they invoke under 28 U.S.C. §1331, it is assumed, from the act of suing, that they must challenge the immunity granted Government agents and employees under the Federal Employees Compensation Act.

2. If the Court overrules its past decisions and entertains the appeal, should an injured Government employee, covered by the Federal Employees Compensation Act, who has applied for and accepted the payment of compensation under the Act, nevertheless be permitted to sue his co-employee of the United States for his injury?

3. If the Court overrules its past decisions and entertains the appeal, has the Appellant proved any "mistake, inadvertence, surprise, or excusable neglect", within the meaning of Rule 60(b), F.R.C.P., sufficient to require the District Court to vacate its judgment of dismissal for lack of prosecution?

No. 15,680—The California Appeal

This appeal presents the questions:

1. Has the United States consented to be sued for injuries suffered by a Civil Service seaman on a public vessel, in the course of his employment from acts of other officers and employees of the United States, acting in the course of their employment and under color of their offices, where the injured employee was covered by the Federal Employees Compensation Act and has applied for and accepted the payment of compensation under the Act?

2. May the injured employee, in such a case, debarred from suing the United States, nevertheless be permitted to sue his co-employees of the United States for his injury?

3. May a Government employee recover damages from other Government employees for the conse-

quences of disciplinary action taken against him on the reports and testimony of such other employees?

4. Does a district court lack the power to dismiss an action of which it has no jurisdiction, on its own motion, in order to clear its own docket and protect the parties from the harassment of a multiplicity of actions?

STATEMENT OF THE CASE

These cases arise from an altercation, involving only officers and employees of the United States, in the bar of an officers club on Guam, in April, 1954, and from the subsequent disciplinary action against the Appellant William R. Russell and from his claim and award of Government employees compensation for the injury which resulted. Four lawsuits have resulted, which will be described below.

The Facts

Appellant Russell was a civil service employee of the United States, through the Military Sea Transportation Service of the Department of the Navy (Complaint, Cal. R. V. 1, p. 3, lines 9-13), and was serving as an able bodied seaman on the USNS GENERAL C. G. MORTON, a civilian-manned Navy transport (Appellants' Brief p. 7). At the time of the altercation he was on shore leave during a brief call of his vessel at Guam.

Appellee William H. Cunningham is likewise a civil service employee of the United States, through the Military Sea Transportation Service, Department of

the Navy. Prior to April 1954, he had at some time been an officer on the USNS GENERAL C. G. MORTON (See Stafford Dep., Guam R. p. 11, lines 7-19). At the time of the altercation it is admitted that he was a civilian officer of the United States assigned as Harbor Pilot at Guam (Appellants' Brief p. 9, lines 20-22). Appellee Frank E. Braley was also a civil service employee of the United States, through the Military Sea Transportation Service, and was serving as an engineering officer on the GENERAL C. G. MORTON (See Braley Dep., Guam R. p. 30, lines 3-7).

Appellee Cliff House was an officers' club⁴ on one of the naval stations on Guam. It is admitted that the Cliff House was an instrumentality of the United States, on property of the United States (Complaint, Cal. R. V. 1, p. 11, lines 9-10). In accordance with the usual practice at overseas officers' clubs, a commissioned officer of the United States Navy, Appellee Lieutenant Raymond H. Tschirgi, was serving as manager of the Cliff House (See Guam R. p. 83, lines 6-7).

In the early evening of April 12, 1954, Russell and one Lawrence Goulett, who was a quartermaster on the GENERAL C. G. MORTON (Appellants' Brief

⁴Appellants state and imply at various points in their brief that the Cliff House was not or had ceased to be an officers' club, in order, presumably, to give the impression that Appellant William R. Russell was entitled to use its bar and restaurant. There is nothing in the record to support this implication or suggest that the club was other than an officers' club, as it has been referred to and considered by the parties and witnesses throughout these cases.

p. 7, lines 24-27), visited the Cliff House where they claim to have been directed for dinner. It appears that Russell spent considerable time in the bar. The consistent testimony of the witnesses whose depositions were taken is that he showed the effects of excessive drinking, was belligerent and objectionably profane and obscene, was engaged in at least one altercation before the one which gave rise to this action and nearly provoked others. (See Stafford Dep., Guam R. p. 16, lines 25-26; Dr. Sweet Dep., Guam R. p. 20, lines 1-23; Braley Dep., Guam R. p. 31, lines 18-25; Waxman Dep., Guam R. p. 38, line 13 to p. 39, line 3). It is stipulated that Russell "conducted himself in an obnoxious manner" (Pre-trial Order, Guam R. p. 7, lines 24-26).

While Russell and his companion, Goulett, were creating a disturbance in the bar, Appellee Cunningham and his wife and children were eating dinner in the dining room of the club. (See, e.g., Stafford Dep., Guam R. p. 13, lines 1-7). It is apparently unquestioned that Lieutenant Tschirgi, the club manager, had difficulty in maintaining order and persuading the offenders to leave and that he went to the dining room and asked Appellee Cunningham for assistance and that this was done because Appellee Cunningham was known to know the crew of the **GENERAL C. G. MORTON**, including Russell, and to have many friends among them (Complaint Cal. R. V. 1, p. 8, lines 3-4; Pre-trial Order, Guam R. p. 8, lines 7-11; see Alexander Dep., Guam R. p. 28, lines 3-4). It appears that Appellee Cunningham agreed and went

to the bar, where he was unsuccessful in quieting Russell or persuading him to leave, and that he then pretended to call the Security Police, after which he was attacked by Russell and Goulett, and that Russell, after being repelled by Appellee Cunningham, fell and struck and broke his glasses, as a result of which he lost the sight of one eye.⁵ Appellee Braley appears to have been on the immediate scene at the time of this altercation. It is unquestioned that Appellee Cunningham was, at the time, engaged in the "preservation of order in the Cliff House" (Complaint, Cal. R. V. 1, p. 11, lines 23-24) and that, in this, as in all matters connected with these cases, the individual Appellees were "agents of the United States, acting within the scope of their agency and in the line of duty" (Complaint, Cal. R. V. 1, p. 11, lines 11-15).

It appears that, within hours after the injury to Appellant, an official investigation of the incident was made by one John Ahrendt, a Navy investigator (Guam R. p. 49, lines 18-19). Appellee Cunningham was interviewed and gave his statement of the matter to this investigator. It is claimed (Complaint, Cal. R. V. 1, p. 5, lines 22-24) that Appellee Cunningham reported Russell's misconduct to Captain William H. Bang, who was the master of the GENERAL C. G. MORTON (See Guam R. p. 40, line 18), as a result of which disciplinary proceedings were taken against Russell. It is also claimed (Complaint, Cal. R. V. 1,

⁵The most complete eyewitness account, in the record, beginning with the request to Appellee Cunningham, is found in Braley's deposition (Guam R. p. 31, line 25 to p. 36, line 10).

p. 6, lines 18-23) that Appellee Cunningham reported the matter to the police of Guam, although it is not said that any criminal action was prosecuted.

Russell promptly retained attorneys, Duffy and O'Connor, and brought suit on April 26, 1954, 14 days after the incident, against Appellee Cunningham, in the District Court of Guam, for \$163,000, on account of alleged assault and battery (Guam R. p. 1).

Subsequently, during the month of April 1955, through the same attorney who now appears for them in this Court, Appellants filed three new actions, of which the present California action No. 34558 (No. 15,680 in this Court) is the third in time sequence. The first two were filed April 7, 1955; one, Civil No. 34549, was filed in the United States District Court for the Northern District of California (Cal. R. V. 1, p. 29); the other was filed in the Superior Court of the State of California, in San Francisco, and later removed to the Federal District Court as Civil No. 34815 (Cal. R. V. 1, p. 56). The federal court action, No. 34549, invoked the federal question and diversity jurisdictions and Federal Tort Claims Act jurisdiction and named all of the Appellees here plus additional defendants,⁶ alleging generally assault and bat-

⁶The additional defendants are George W. Hackworth, Robert L. Peterson and William L. Alexander, all civil service employees of the United States. Hackworth was Chief Radioman of the GENERAL C. G. MORTON (See Stafford Dep., Guam R. p. 12, lines 9-10); Peterson was Second Officer of the GENERAL C. G. MORTON (See Stafford Dep., Guam R. p. 12, lines 6-7); Alexander was Chief Steward of the GENERAL C. G. MORTON (See Alexander Dep., Guam R. p. 27, lines 10-12). All three are charged with libel or slander in having reported the misconduct of Russell by testimony in disciplinary proceedings or otherwise (Complaint in Civil No. 34549, Cal. R. V. 1, pp. 35-41).

tery, libel, slander and malicious prosecution. The California state court action was similar except for the omission of the United States as a party.

In the third California case, No. 34558 (No. 15,680 in this Court), the Complaint below (Cal. R. V. 1, p. 1) was filed April 11, 1955 by Appellants, man and wife, against Appellees United States, Cunningham, Braley, Tschirgi and Cliff House, and 60 avowedly fictitious defendants. The defendants were charged variously with assault and battery, libel, slander and malicious prosecution.

The Appellees, on August 2, 1955, removed the State court action to the Federal District Court, under 28 U.S.C. §1442, where it was docketed as Civil No. 34815 (Cal. R. V. 1, p. 56). An Order (Cal. R. V. 1, p. 19) was secured dismissing Civil No. 34549 as to the United States for lack of Tort Claims Act jurisdiction and staying the companion cases, Civil No. 34558 (No. 15,680 in this Court) and Civil No. 34815 on the grounds that they presented the same claims against the same parties.⁷

In accordance with its policy,⁸ the Department of Justice, at the request of the Secretary of the Navy, undertook the defense of the Government's employees, Appellees in these cases, who were being sued for acts

⁷From this non-appealable order the Appellants took an appeal in No. 34549 (No. 15,034 in this Court) which was duly dismissed by this Court. *Russell v. Hackworth, et al.*, 233 F.2d 503 (9th Cir. 1956).

⁸See R.S. 367 (5 U.S.C. §316) and 31 Comp. Gen. 661 (1952).

done by them in the performance of their official duties and under color of their offices.⁹

Meanwhile Russell filed his claim for compensation under the Federal Employees Compensation Act, under which he ultimately received an award and was paid (Cal R. V. 2, p. 8, lines 2-22).

On August 15, 1955, when, after extensive delay, it appeared that Plaintiff Russell was not ready to go to trial, the District Court of Guam dismissed the Guam action for lack of prosecution. From that judgment, an appeal (No. 14,942) was taken to this Court, which affirmed the judgment of dismissal, in *Russell v. Cunningham*, 233 F.2d 806 (9th Cir. 1956). After the affirmance, Plaintiff-Appellant made a motion, under Rule 60(b), F.R.C.P., to set aside the judgment of dismissal, from the denial of which the instant appeal, No. 15,450, has been taken.

Subsequently, and while the Guam appeal (No. 15,450) was pending, the District Court for the Northern District of California, on April 25, 1957, held a hearing (Cal. R. V. 2) to review the records in the three cases before it, No. 34549, No. 34558 (No. 15,680 in this Court) and No. 34815. At this hearing, it appeared that Plaintiff-Appellant Russell admitted coverage under the Federal Employees Compensation Act and receipt of an award under the Act and that

⁹The suits are typical of those brought against Government officers in state courts, which, like the California state court action referred to above (N.D.Cal. No. 34815 after removal), are removed to the federal court under 28 U.S.C. §1442. Cf. *De Busk v. Harvin*, 212 F.2d 143 (5th Cir. 1954) (claim for maliciously procuring discipline and discharge of employee).

all of the claims of Plaintiffs-Appellants against others than the United States were already placed in litigation in the three earlier suits, in which any possible jurisdiction had already been invoked. Accordingly, Judge Goodman rendered a judgment dismissing California action No. 34558, from which the instant appeal No. 15,680 has been taken.

Eventually, both appeals were ordered by this Court to be heard together. A narrative of the significant proceedings in each of the instant cases follows.

No. 15,450—The Guam Appeal

The action in the District Court of Guam against Appellee Cunningham alone, for assault and battery, was filed April 26, 1954 (Guam R. p. 1). Promptly, on May 22, 1954, Plaintiff Russell took the depositions of six witnesses on behalf of Plaintiff, including the deposition of Appellee Braley (Guam R. pp. 10-41). These depositions presumably were uniformly disappointing to the Plaintiff.

The Guam action came on for pre-trial and, on June 4, 1954, a Pre-trial Order (Guam R. p. 7) was filed which had been approved by the attorneys for both parties and signed by the Judge. The Pre-trial Order and agreement, after reviewing the pleadings, contentions and agreements of fact of the parties, including the stipulation "that the plaintiff had conducted himself in an obnoxious manner" (Guam R. p. 7, lines 24-26), went on to provide which witnesses would testify in person and which by depositions. The Plaintiff Russell was to testify by deposition, as was

his companion, Goulett (Guam R. p. 8, lines 25-26). The depositions previously taken by Plaintiff (Guam R. pp. 10-41) were to be introduced by Defendant without objection (Guam R. p. 9, lines 10-13). The Pre-trial Order continued with a provision that the parties should be bound by the stipulations set forth therein and that trial should be held Monday, August 2, 1954, at 9:30 a. m.

On July 30, 1954, the trial date was ordered set aside and the case continued for resetting (Guam R. p. 168, line 14). No further action appears on the docket until March 1, 1955, when a motion was made to require security for costs to be posted, as required by the local rules in Guam (Guam R. p. 168, line 17). At the hearing of this motion, the Court, at the suggestion of Russell's own counsel, set the case for trial on April 18, 1955, a year after the incident (Guam R. p. 197, lines 8-15).

Thereafter, the Guam action, previously set for trial April 18, 1955, was, for some reason, set over to May 3, 1955 (See Guam R. p. 52, lines 2-3). On April 19, 1955, Appellant filed a Motion for Postponement of Trial (Guam R. p. 50) and Affidavit in support of the Motion (Guam R. p. 44). In his Affidavit, Russell, notwithstanding the stipulation and order that he testify by deposition, gave as a reason for postponement his desire to be present in person to testify (Guam R. p. 49, line 3). In addition, he asserted the desire to take new depositions of Braley and Alexander, upon the ground that the depositions already taken by him were not satisfactory to him, and to take the deposi-

tion of Robert Peterson, notwithstanding a previous stipulation (Guam R. p. 40, lines 15-16) that Peterson's deposition not be taken. He stated (Guam R. p. 44, lines 19-22) that he would need not less than three, and preferably four, months to prepare for trial. The motion was made by Appellant on his own behalf and not through his attorney of record. The Court, on April 19, 1955, made an Order (Guam R. p. 51) continuing the trial to August 15, 1955 and ordering further that "the Plaintiff will be expected to be present at that time to testify in person or to testify by deposition, since this order assumes at the present time that further continuance will not be granted."

Despite the court's order that no further continuance would be granted, Appellant, this time through his attorney of record, on August 10, 1955, made a Motion for Postponement of Trial or for Dismissal without Prejudice (Guam R. p. 53), accompanied by an Affidavit of his attorney (Guam R. p. 52) which does not appear to set forth any satisfactory reason for the failure of the Appellant to have his deposition taken.¹⁰ The motion was heard August 12, 1955, and was denied (Guam R. p. 172, lines 2-8). When the case duly came on for trial, August 15, 1955, the Plaintiff's counsel stated that he was unable to proceed to trial and an Order of Dismissal for Lack of Prosecution was made (Guam R. p. 55). In making

¹⁰Appellants' counsel complains (Appellants' Brief p. 83) of the "cumbersome" and impliedly expensive procedure required to take this deposition on notice. Presumably he refers to the necessity of mailing to Appellant Cunningham's counsel on Guam a notice that Russell's deposition would be taken at a certain time and place in San Francisco. Rule 30(a), F.R.C.P.

the Order the Court also made a number of findings of fact, which, although interesting, were, of course, superfluous in an order of this character. An appeal was taken from this judgment of dismissal (Guam R. p. 61).

This Court, on May 21, 1956, affirmed the judgment of the District Court of Guam dismissing the action there for lack of prosecution. *Russell v. Cunningham*, 233 F.2d 806 (9th Cir. 1956). This Court noted the attempt of Appellant to rely on statements outside the record and observed that it was open to the Appellant to ask the lower court to consider the effect of such statements, by a motion under Rule 60(b), F.R.C.P.

Although Appellant had had since August 15, 1955 to do so, it was not until August 9, 1956 that Appellant filed his motion to vacate in the court below (Guam R. p. 76). He did not notice it for hearing and it remained to be called up on the Court's own initiative (Guam R. p. 172, line 24 to p. 173, line 2). From the affidavits accompanying the motion it appears that Russell was actually on Guam during two days, June 21-22, 1955, when his deposition could have been taken in plenty of time for the trial date (Guam R. pp. 139-141; See also the Court's comments, Guam R. p. 224, lines 22-28).

From the Affidavits it also appears that, while the attorneys of record for Russell continued to be Duffy and O'Connor, a San Francisco attorney had been engaged to take certain depositions, that Russell was obtaining advice from the San Francisco attorney and that the reason why his case was not prepared for

trial was that he had been advised by the San Francisco attorney to testify in person, contrary to the position taken and stipulated to by his attorneys of record and ordered by the Guam Court (Appellants' Brief p. 20, lines 13-15; see also Guam R. pp. 87-88, 94, 202, 216, 222). The main theme of the affidavits in support of the motion to vacate is the inability of Russell to be present on Guam at the trial date in accordance with the advice he had received from San Francisco counsel. No explanation appears as to why his deposition could not have been taken on Guam, June 21-22, 1955, in accordance with the pre-trial stipulation and order.

When the motion was called up, on the Court's own initiative, it was fully heard and carefully considered (Guam R. pp. 212-227) and was denied by an Order of October 26, 1956 (Guam R. p. 158). The present appeal in No. 15,450 was taken from this denial.

Although Notice of Appeal (Guam R. p. 158) was filed November 21, 1956, a Designation of Record was not filed in the lower court until January 26, 1957 (Guam R. p. 163). The records of this court will show that the case was docketed here February 25, 1957, although no extension of time to file and docket was applied for or granted in the lower court. The delay of 2½ years in the preparation of the record here has been ostensibly due to the desire of the Appellant to augment the record with a considerable body of material, comprised in Volume II of the Guam Record, most of which (all but pp. 211-229), antedates Russell's first appeal and has nothing to do with his motion to vacate the final judgment.

No. 15,680—The California Appeal

In Paragraph 1C of the Complaint in California case No. 34558 (No. 15,680 in this Court), jurisdiction is alleged to be founded upon the “existence of diversity of citizenship between . . . Plaintiffs and . . . Defendants”, upon “the existence of rights created and based upon federal laws of the United States”, and, “as to Defendant United States Government and its agents upon the existence of rights under the Federal Tort Claims Act”. Plaintiffs allege, in Paragraph 1B of the Complaint, that they “reside in San Francisco, California” and that “each Defendant is a resident of a State or Territory other than . . . California”. The Complaint contains no allegation whatever of the citizenship of any party. Appellants admit elsewhere that they do not know the citizenship of the Defendants (Cal. R. V. 2, p. 6, lines 5-13; Appellants’ Brief pp. 46c-46d).

The Complaint is in 10 counts and alleges an assault and battery by Defendant Cunningham as well as libel, slander and malicious prosecution by him, resulting in disciplinary and criminal actions against Plaintiff William R. Russell, and assault and battery by Defendant Braley. It alleges that Defendant Tschirgi caused an assault and battery by Defendant Cunningham, and also alleges slander and perhaps malicious prosecution by Defendant Tschirgi, resulting in disciplinary and criminal actions against Plaintiff William R. Russell. It charges the Cliff House, as principal, with all of the actions of the individual defendants, as agents, and charges a conspiracy of all

the defendants in the alleged assault, battery, libel and slander, etc. Plaintiff Anna L. Russell, as wife of Plaintiff William R. Russell, adopts all of these charges and makes a claim for loss of consortium. Finally, the Complaint alleges that all of the other defendants were agents, employees or instrumentalities of Defendant United States acting within the scope of their agency and seeks to charge the United States with liability.

The District Court for the Northern District of California was well aware of the pending Guam action, as well as those actions it had before it, and the California cases had all been stayed pending the final result in the Guam action. In April, 1957, Judge Goodman, of the California court, set all three cases, including No. 34558 (No. 15,680 in this Court) for a hearing on April 25, 1957, to examine the records, inquire about progress in the Guam action and determine what could be done with the cases. The transcript of that hearing is Volume II of the record in the California case. It was at that hearing that it was first made of record that Russell had not only applied for but received compensation under the Federal Employees Compensation Act and it was admitted then by Appellants' counsel that the United States could not be sued (Cal. R. V. 2, p. 8).

At the hearing, Appellants' counsel agreed that Civil No. 34558 (No. 15,680 in this Court) should be dismissed in its entirety since, in every respect, it duplicated cases filed earlier and since it afforded no different or additional basis of acquiring jurisdiction

(Cal. R. V. 2, pp. 12-13). The California court recognized the exclusiveness of the Guam action as to the assault and battery charge against Appellee Cunningham and proposed to dismiss those charges in all the California actions (Cal. R. V. 2, p. 22, lines 5-8), and Mr. Lawrence also agreed to this (Cal. R. V. 2, p. 22, line 9).

At the conclusion of the hearing, Judge Goodman, on the basis of the agreed facts, made the order dismissing the instant action, No. 34558 (No. 15,680 in this Court) and also ordered the earlier actions, No. 34549 and No. 34815 dismissed as to Defendant Cunningham, with respect to the assault and battery charge of which the District Court of Guam was already possessed. These orders were all combined in one document filed April 26, 1957 (Cal. R. V. 1, p. 22), from which, so far as it affects No. 34558 only, the instant appeal No. 15,680 was taken.

Appellants, in the California case, No. 34558 (No. 15,680 in this Court), on May 20, 1957, filed a Motion for Relief from Orders of Dismissal (Cal. R. V. 1, p. 24) and, on May 23, 1957, filed a Motion for Leave to Appeal in Forma Pauperis (omitted by Appellants from the typed record). The Motion for Relief was never noticed for hearing by Appellants and was never disposed of. The Motion for Leave to Appeal in Forma Pauperis came on for hearing before Judge Goodman, August 5, 1957, and was denied with a certification that this appeal is not taken in good faith (Cal. R. V. 1, p. 59).

STATUTES INVOLVED

The pertinent provisions of the Judicial Code, 28 U.S.C. §§1331 and 1332, and the Federal Employees Compensation Act of September 7, 1916, c. 458, 39 Stat. 742 (as amended 5 U.S.C. §§751 *et seq.*), at §§26, 27, 42 (as amended, 5 U.S.C. §§776, 777, 793) are set forth in the Appendix, *infra*. The pertinent provisions of the Federal Tort Claims Act, at 28 U.S.C. §2680(h), appear in the text of the Argument, *infra*.

SUMMARY OF ARGUMENT

The Guam appeal (No. 15,450) is taken, not from the final judgment in the case, which has already been appealed once and affirmed, but from a mere non-appealable order denying a motion to set aside or vacate the final judgment. Accordingly, under the settled rule expressed in numerous decisions of this Court and the Supreme Court, the Guam appeal should be dismissed for lack of jurisdiction. *Hicks v. Bekins Moving & Storage Co.*, 115 F.2d 406 (9th Cir. 1940).

The Appellants have no right to sue the United States for Appellant's injury as they seek to do in the California action (No. 15,680 in this Court) since it is admitted that Appellant, as a civil service employee of the United States, is covered by the Federal Employees Compensation Act, under which he has applied for and received an award of compensation for his injury. The Act is exclusive of any other right of the employee or his wife to sue or otherwise

recover against the United States for an injury incident to his service. *Johansen v. United States*, 343 U.S. 427, 1952 A.M.C. 1043; *Thol v. United States*, 218 F.2d 12 (9th Cir. 1954). In addition, the particular claims asserted are all expressly excepted from the consent to sue granted in the Federal Tort Claims Act, upon which Appellants rely. 28 U.S.C. §2680(h).

The Federal Employees Compensation Act is exclusive not only as to the United States, but also as to its agents and employees. It would thwart the Congressional purpose to permit either the Government, as subrogee, or the injured employee to recover against co-employees or other agents of the Government, where the compensation remedy is provided. *Johansen v. United States*, 343 U.S. 427, 1952 A.M.C. 1043; *United States v. Gilman*, 347 U.S. 507 (1954). It is settled law that such other agents or employees of the Government are not "third persons" whom the Federal Employees Compensation Act permits the injured employee or the Government, as subrogee, to sue. Accordingly, Appellants are barred from suing not only the United States, but also the other defendants in California case No. 34558 (No. 15,680 in this Court), and Appellee Cunningham in the Guam case (No. 15,450 in this Court), for Appellant's service-incident injury.

With respect to Appellants' claims, in the California case (No. 15,680 in this Court), for libel and slander, it is apparent that these charges are directed at reports and testimony of Government employees in connection with official investigations and disciplinary

proceedings and, evidently, a report of the circumstances of Appellant's injury to the Guam police. Under long settled law, all such statements are absolutely privileged in the interest of law enforcement and the unfettered administration of Government employee relations and discipline and accordingly such charges are strictly internal disciplinary matters not actionable in court. *Mellon v. Brewer*, 18 F.2d 168, 171 (D.C. Cir. 1927) cert. denied 275 U.S. 530, and cases cited; *Vogel v. Gruaz*, 110 U.S. 311 (1884).

The District Court, in California case No. 34558 (No. 15,680 in this Court) was entirely correct in dismissing the case below, since it had no jurisdiction. The Federal Employees Compensation Act and the exceptions in the Federal Tort Claims Act precluded jurisdiction against the United States; the requirements of diversity jurisdiction were shown not to be met by the Complaint itself; and there was no showing of any basis for federal question jurisdiction without anticipating defenses not in the record, which is not enough to sustain jurisdiction. In addition, the record shows that any jurisdiction of the subject matter here which it was possible to obtain had already exclusively attached in other cases before this one was filed. Accordingly, the court below, having undoubted power to regulate its own docket, on its own motion, correctly dismissed this action, of which it had no jurisdiction, in the interest of preventing an abusive multiplicity of suits.

ARGUMENT

I

THE APPEAL FROM THE DISTRICT COURT OF GUAM IN NO. 15,450 IS TAKEN FROM A NON-APPEALABLE ORDER AND SHOULD THEREFORE BE DISMISSED FOR LACK OF JURISDICTION

Hicks v. Bekins Moving & Storage Co., 115 F.2d 406 (9th Cir. 1940), the leading case in this Circuit on dismissal by the district courts for lack of prosecution, requires dismissal of the Guam appeal presently before the Court, for lack of jurisdiction, as taken from a non-appealable order, rather than from the final judgment in the case.

In the *Hicks* case, as here, a judgment of dismissal for lack of prosecution was entered and appealed from. Subsequently, Hicks made a motion, as did Appellant Russell here, to vacate and set aside the judgment upon the grounds of excusable neglect, supporting his motion with affidavits of the circumstances leading up to the dismissal. From the denial of this motion, he also appealed.

Since Hicks moved promptly, in contrast to Appellant Russell, both of his appeals came on to be heard together in this Court. This Court affirmed the judgment of dismissal and in doing so it properly considered only the record made prior to the notice of appeal from the judgment.¹¹ In the appeal from the

¹¹See Transcript of Record in No. 9511 in the records of this Court. The ruling that the affidavits in support of the motion to set aside the judgment are no part of the record in reviewing the judgment of dismissal was made explicit in *Bowers, et al. v. E. J. Rose Mfg. Co.*, 149 F.2d 612, 613 (9th Cir. 1945) cert. denied

denial of the motion, under Rule 60, to vacate and set aside the judgment on the ground of excusable neglect, this Court, of its own initiative, dismissed the appeal for lack of jurisdiction, noting that it had jurisdiction to review only final judgments and following the settled rule that an order denying such a motion does not constitute another final judgment in the same case.¹²

In the Notice of Appeal in the instant Guam case (Guam R. p. 158), Appellant Russell vaguely purports not only to appeal from denial of his motion but to appeal anew from the judgment of dismissal already once appealed from and affirmed in *Russell v. Cunningham*, 233 F.2d 806 (9th Cir. 1956) (No. 14,942). Such a new appeal from the same judgment cannot be entertained. As the Court said in *Thompson v. Maxwell Land Grant & Railway Co.*, 168 U.S. 451, 456 (1897), “[W]hatever has been decided on one appeal or writ of error cannot be reëxamined on a second appeal or writ of error brought in the same suit.”¹³

326 U.S. 753, where the Court followed *Hicks* in again dismissing the appeal from denial of the motion and considering only the simultaneous appeal from the judgment of dismissal.

¹²Nor does such an order suspend the finality of the judgment already entered. Rule 60(b) F.R.C.P.: “A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation.”

¹³Even in a case where the appellate court reverses a judgment below and it is vacated and a new judgment entered, so that a new appeal is possible, the second appeal brings up only the proceedings subsequent to the mandate on the first appeal. *Noonan v. Bradley*, 12 Wall. 121, 129 (1870); *Freeman v. Smith*, 62 F.2d 291, 293 (9th Cir. 1932) cert. denied 282 U.S. 904.

The present Guam appeal is squarely within the settled rule applied by this Court in the *Hicks* case,¹⁴ from which it is indistinguishable, and the Guam Appeal (No. 15,450) should therefore be dismissed.¹⁵

¹⁴The *Hicks* case, itself firmly grounded on previous decisions of this Court and the Supreme Court, has since been regularly applied in dismissing appeals, such as the present one, from orders denying amendments or vacations of judgments, such orders being entirely discretionary with the trial courts. *Bowers, et al. v. E. J. Rose Mfg. Co.*, 149 F.2d 612, 613 (9th Cir. 1945) cert. denied 326 U.S. 753 (motion to set aside judgment of dismissal); *Simons v. United States*, 162 F.2d 905, 906 (9th Cir. 1947) (motion to set aside judgment of dismissal); *Lunn v. F. W. Woolworth Co.*, 207 F.2d 174, 175 (9th Cir. 1953) cert. denied 346 U.S. 900 (motion to amend judgment). Cf. *Libby McNeil & Libby v. Malmskold*, 115 F.2d 786, 787 (9th Cir. 1940) (The fact that an "order refusing a new trial may be an abuse of discretion which would justify its consideration by an appellate court does not make the order itself appealable. The review must be incident to an appeal from an appealable order such as a final judgment.").

¹⁵It may be noted that the motion, from the denial of which the Guam appeal was taken, is without merit. No showing appears of any "mistake, inadvertence, surprise, or excusable neglect" within the standards laid down by the courts, under Rule 60(b). An excellent review of the standards, including the California antecedents of the rule, appears in *Ledwith v. Storkan*, 2 F.R.D. 539 (D. Neb. 1942). See also *Federal Enterprises v. Frank Allbritten Motors*, 16 F.R.D. 109 (W.D. Mo. 1954); *Washington Farms v. United States*, 122 F. Supp. 31 (M.D. Ga. 1954); *United States v. Young*, 17 F.R.D. 91 (N.D. Ill. 1953).

II

APPELLANTS' SUITS IN BOTH OF THE INSTANT APPEALS ARE BARRED BY THE RULE THAT APPELLANTS' RIGHTS UNDER THE FEDERAL EMPLOYEES COMPENSATION ACT, FOR THE INJURY INCURRED BY APPELLANT AS A CIVIL SERVICE EMPLOYEE OF THE UNITED STATES, IN THE SERVICE OF HIS VESSEL, ARE EXCLUSIVE OF ANY OTHER RIGHT OR REMEDY AGAINST THE UNITED STATES, ITS AGENTS OR EMPLOYEES

A. The Federal Employees Compensation Act Is Unquestionably Applicable and Exclusive as to Appellants' Claims for Injury.

It is undisputed that Appellant William R. Russell was a civil service seaman on a public vessel of the United States, that he was injured while on shore leave from his vessel at Guam, and that he applied for and received an award, and was paid, under the Federal Employees Compensation Act of September 7, 1916, c. 458, 39 Stat. 742 (as amended, 5 U.S.C. §751 *et seq.*).

The exclusive character of the compensation remedy as to such civilian public vessel seamen, even in the absence of any statutory provision, has been declared in *Johansen v. United States*, 343 U.S. 427, 1952 A.M.C. 1043 and recently reaffirmed in *Patterson v. United States*, 359 U.S. 495, 1959 A.M.C. 1640. These cases make it plain that the United States has not consented to be sued by employees in the status of Appellant Russell in this case, for injuries suffered while in the service of their vessels, and that the entire rights of such employees and their dependents against the United States for such injuries are those provided

by the Federal Employees Compensation Act.¹⁶ As the Supreme Court said in the *Johansen* case, "the Federal Employees Compensation Act is the exclusive remedy for civilian seamen on public vessels. As the Government has created a comprehensive system to award payments for injuries, it should not be held to have made exceptions to that system without specific legislation to that effect." (343 U.S. at 441, 1952 A.M.C. at 1053.) This immunity undoubtedly extends to such non-appropriated-fund activities and organizations as officers' clubs and post exchanges. Cf. *Standard Oil Co. v. Johnson*, 316 U.S. 481, 485 (1942); *Nimro v. Davis*, 204 F.2d 734, 736 (D.C. Cir. 1953) cert. denied 346 U.S. 901.

¹⁶Similarly, without express prohibition in the Federal Tort Claims Act, other classes of Government employees having their own systems of compensation are held precluded from suit under its provisions. *Feres v. United States*, 340 U.S. 135, 144 (1950) (Serviceman. "This Court, in deciding claims for wrongs incident to service under the Tort Claims Act, cannot escape attributing some bearing upon it to enactments by Congress which provide systems of simple, certain, and uniform compensation for injuries or deaths of those in armed services. . . . If Congress had contemplated that this tort act would be held to apply in cases of this kind, it is difficult to see why it should have omitted any provision to adjust these two types of remedy to each other."); *Lewis v. United States*, 190 F.2d 22 (D.C. Cir. 1951) cert. denied 342 U.S. 869 (United States Park Police); *Aubrey v. United States*, 254 F.2d 768 (D.C. Cir. 1958) (Employees of Naval Officers' mess, a non-appropriated fund instrumentality of United States, carrying employees' compensation insurance pursuant to Act of June 19, 1952, c. 444, §2, 66 Stat. 139, as amended, 5 U.S.C. §150k-1); *United States v. Forfari*, 268 F.2d 29 (9th Cir. 1959) cert. denied U.S. (Employee of Naval shipyard cafeteria, a non-appropriated fund instrumentality of the United States, carrying employees' compensation insurance pursuant to Act of June 19, 1952, c. 444, §2, 66 Stat. 139, as amended, 5 U.S.C. §150k-1).

Although, in this case, Appellant has received an actual award and payment of compensation, the contentions of Appellants concerning the "finality" of the award make it appropriate to point out that the existence or amount of any actual award or payment under the Act is immaterial. That the Compensation Act applies to Appellant in this case is undisputed, since the record shows that he has consistently taken the position that he was entitled to an award under the Act. Where the coverage of the Compensation Act exists, suit against the United States is precluded even though no claim for compensation has been made. *United States v. Firth*, 207 F.2d 665 (9th Cir. 1953). And even though no actual benefits are payable under the Act for the particular loss or injury involved, there still is no consent to sue the United States. *United States v. Forfari*, 268 F.2d 29 (9th Cir. 1959) cert. denied U.S.; *Thol v. United States*, 218 F.2d 12, 13 (9th Cir. 1954); *Underwood v. United States*, 207 F.2d 862 (10th Cir. 1953) (attempt of spouse to sue for loss of consortium); *Mayo v. United States*, 139 F. Supp. 46, 1956 A.M.C. 1201 (N.D.Cal.); *Hartzog v. United States*, 139 F. Supp. 47, 1956 A.M.C. 1203 (N.D.Cal.);¹⁷ *Swenarski v. United States*, 124 F. Supp. 200, 1954 A.M.C. 1408 (N.D.Cal.). Cf. *Briemhorst v. Beckman*, 227 Minn. 409, 426, 35 N.W.2d 719, 730 (1949); *Blaine v. Hut-*

¹⁷"[T]he central thought of the Supreme Court decision is that the United States has not consented to be sued for damages by or on behalf of members of the civil service component of the crew of military transport vessels, and that the Federal Employees Compensation Act of 1916 is the only remedy available to such employees." (139 F.Supp. at 48, 1956 A.M.C. at 1204).

tig Sash & Door Co., 232 Mo. App. 870, 105 S.W.2d 946 (1937).

Seamen have long been regarded as in the service of their vessels while on shore leave, so as to recover maintenance and cure for injuries sustained at such times. Although there was some doubt, when Appellant Russell applied for Compensation, that he could be awarded it, this was not because of his employment status, but because of the circumstances in which he was injured. The decision in *Adams' Case*, 1956 A.M.C. 271 (Dept. of Labor, Employees Compensation Appeals Board, Dec. 7, 1955) followed the analogy to maintenance and cure and applied the very liberal standards of modern cases concerning the facts which would disqualify a seaman on shore leave from receiving maintenance and cure or compensation under other acts.¹⁸ It was this decision which opened the way for Appellant Russell to the actual recovery of benefits under the Act, which the record shows he received.

Appellants contend that, as a condition to the dismissal of their suits against the Government, they should receive some kind of "binding" agreement that the award of compensation is final and irrevocable,¹⁹ or else what amounts to a judgment to the

¹⁸See *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 1943 A.M.C. 451; *Farrell v. United States*, 336 U.S. 511, 1949 A.M.C. 613; *Warren v. United States*, 340 U.S. 523, 1951 A.M.C. 416; *Turner v. City of New York*, 249 App.Div. 790, 292 N.Y.Supp. 375 (1936); *Smith v. Coykendall's Estate*, 251 App.Div. 757, 295 N.Y.Supp. 575 (1937) aff'd 277 N.Y. 537, 13 N.E.2d 463 (1938).

¹⁹Of course any such agreement would be illusory, since no Government agent has authority to agree to preclude the execution of an Act of Congress at some later date.

same effect. They thus ask what no other Government employee receives or is entitled to. Appellants' demand arises from the misconception that the bar to their suits is dependent upon actual payment, rather than coverage, under the Compensation Act, which we have already shown to be incorrect. The absurdity of this demand will be appreciated when we recall that the suits of *Johansen*, *Patterson* and others whose cases are cited here were required to be dismissed unconditionally although the employees suing, unlike Appellant, had not received any awards at all.

Seemingly, Appellants would have the Court impose upon the judgment below in the California case a condition concerning the "finality" of the Compensation award. Under §42 of the Act (as amended, 5 U.S.C. §793) (Appendix), neither this Court nor any other has jurisdiction to review or control any award, or order concerning an award, under the Act. *Rivera v. Mitchell*, 244 F.2d 783 (D.C.Cir. 1957) cert. denied 355 U.S. 862; *Blanc v. United States*, 244 F.2d 708 (2nd Cir. 1957) cert. denied 355 U.S. 874; *Hancock v. Mitchell*, 231 F.2d 652 (3rd Cir. 1956); *Calderon v. Tobin*, 187 F.2d 514, 516 (D.C.Cir. 1951) cert. denied 341 U.S. 935 ("The federal employees' compensation allowances are grants by the Congress, and the agents of the Congress have power to determine the recipients of such grants. If Congress chose to preclude judicial review of the selection of the objects of its bounty, it could do so."): What the Court is forbidden to do by judgment directly against the United States, it certainly may not do by the imposition of conditions

upon a judgment required to be entered in favor of the United States. Cf. *The Antelope*, 12 Wheat. 546, 550 (1827) (attempt to impose costs unauthorized by statute as a condition to execution of decree).

Appellants, in suing the United States, have relied upon the Federal Tort Claims Act, 28 U.S.C. §§1346 (b), 2671 *et seq.* Because of the exclusiveness of the Federal Employees Compensation Act, it is plain that the United States has not consented to be sued by Appellant under any statute whatever. We note in passing, however, the lack of substance in Appellants' reliance upon the Federal Tort Claims Act, in particular.

The Federal Tort Claims Act jurisdiction over the United States in certain cases is conferred in 28 U.S.C. §1346(b). The Act, at 28 U.S.C. §2680, reads in pertinent part:

The provisions of . . . section 1346(b) of this title shall not apply to—

* * *

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

In view of the explicit allegations of the Complaint, it is hard to see how there could be a clearer case for lack of jurisdiction over the Federal Torts Claims Act. It is obvious that every claim stated by Appellants arises out of one or more of the acts explicitly

enumerated as exceptions to the Tort Claims Act²⁰ jurisdiction and that, even apart from the Compensation Act, Appellants could not maintain their actions against the United States.²¹

²⁰The exceptions of "assault" and "battery" apply to the use of excessive force, even by a police officer or sentry, in making an arrest, detaining a person, or otherwise attempting to enforce law or keep order. *Stepp v. United States*, 207 F.2d 909 (4th Cir. 1953) cert. denied 347 U.S. 933; *Lewis v. United States*, 194 F.2d 689 (3rd Cir. 1952); cf. *United States v. Hambleton*, 185 F.2d 564 (9th Cir. 1950). The addition of negligence at some point in the chain of causation does not alter the fact that the claim is one "arising out of" assault and battery or misrepresentation, as the case may be. *Moos v. United States*, 225 F.2d 705 (8th Cir. 1955); *Clark v. United States*, 218 F.2d 446, 452 (9th Cir. 1954); cf. *Klein v. United States*, 268 F.2d 63, 1959 A.M.C. 1680 (2nd Cir.) (attempt to circumvent the "false imprisonment" exception by alleging negligence); *Rufino v. United States*, 126 F. Supp. 132, 137 (S.D.N.Y. 1954) (the plaintiff cannot circumvent the exception of assault "by pleading some other cause of action" such as "negligence . . . in not preventing an assault"). The words "Any claim arising out of" in 28 U.S.C. §2680(h) mean "any claim originating from, incident to or having connection therewith." *Klein v. United States*, 167 F. Supp. 410, 412 (E.D.N.Y. 1958), aff'd 268 F.2d 63, 1959 A.M.C. 1680 (2nd Cir.).

²¹The Complaint in the California appeal attempts to state an independent claim by Mrs. Russell, based on loss of consortium. Even if the wife would otherwise have a right to sue for loss of consortium, the Federal Employees Compensation Act would bar such a suit in the present case. *Underwood v. United States*, 207 F.2d 862 (10th Cir. 1953); see *Smither and Company v. Coles*, 242 F.2d 220, 222-223 (D.C. Cir. 1957) cert. denied 354 U.S. 914. But as a matter of territorial law, Mrs. Russell would clearly have no right to recover for loss of consortium in any case. This follows from *Filice v. United States*, 217 F.2d 515 (9th Cir. 1954), in which this Court, construing California law, held there could be no such recovery by a wife. The Civil Code of Guam is that of California, adopted with scarcely any change. See Foreword to Civil and Penal Codes of Guam, 1953. The California Civil Code sections which were construed in the *Filice* case, CC §§1708, 1714, 3281, 3282 and 3523 are identical, respectively with Guam CC §§1708, 1714, 3281, 3282 and 3523.

B. Appellants May Not Be Allowed to Circumvent the Employees Compensation System by Suing Other Employees and Agents of the United States Under the Pretext That Such Employees and Agents Are Third Parties.

Appellants, whose claim is admittedly subject to the Federal Employees Compensation Act, have sued a number of parties other than the United States, all of whom are affirmatively shown by the record to have been agents and employees of the United States acting as such in all material matters. Presumably Appellants regard these parties as third parties who may be sued under §26 of the Federal Employees Compensation Act (5 U.S.C. §776) and thereby overlook completely the fact that all are Government agents and employees.

It is surely settled that non-appropriated fund activities such as the officers' club in this case, post exchanges, and cafeterias on naval stations are all agencies and instrumentalities of the United States enjoying the same immunities as the United States. *Standard Oil Co. v. Johnson*, 316 U.S. 481, 485 (1942) (post exchange); *Nimro v. Davis*, 204 F.2d 734, 736 (D.C. Cir. 1953) cert. denied 346 U.S. 901 (Navy lunchroom). Manifestly such organizations enjoy the immunity represented by the exclusiveness of the compensation remedy. Appellants, in the present cases, seek to go farther down the economic scale and impose upon co-employees, personally, a burden of which those better able to bear it have been relieved.

Novel as these actions are, under the Federal Employees' Compensation Act, the demand of an employee to impose the burden upon his co-employee for

injuries incident to service has been rejected under the Longshoremen's and Harbor Workers' Act and a number of state compensation acts, all similarly worded.²² The courts have held, under such acts, that the permission given to sue a "person other than" the employer does not permit the employee to sue his supervisors or other co-employees or agents of the employer. *Doane v. E. I. DuPont De Nemours & Co.*, 209 F.2d 921 (4th Cir. 1954) ("any other party"); *Ginnis v. Southerland*, 50 Wash.2d 557, 313 P.2d 675 (1957) (Longshoremen's and Harbor Workers' Compensation Act, §33, 44 Stat. 1440, 33 U.S.C. §933, as amended: "some person other than the employer"); *Warner v. Leder*, 234 N.C. 727, 69 S.E.2d 6 (1952) ("any person other than the employer"); *White v. Ponozzo*, 77 Idaho 276, 291 P.2d 843 (1955) ("some person other than the employer"); *Bresnahan v. Barre*, 286 Mass. 593, 190 N.E. 815 (1934) ("some person other than the insured" does not include employees or subcontractors or their employees); *Wechsler v. Liner*, 328 Mass. 152, 102 N.E. 2d 92 (1951) ("some person other than the insured"); *Majors v. Moneymaker*, 196 Tenn. 698, 270 S.W.2d 328 (1954) ("some person other than the employer"); *Feitig v. Chalkley*, 185 Va. 96, 38 S.E.2d 73 (1946) ("other person"); *O'Brien v. Rautenbush*, 10 Ill.2d 167, 139 N.E.2d 222 (1956) ("some person other than the employer"); *Mahan v. Litton*, 321 S.W.

²²Decisions under the state acts are frequently used in construing the similar federal acts. See, e.g., *Thol v. United States*, 218 F.2d 12, 13 (9th Cir. 1954); *Underwood v. United States*, 207 F.2d 862, 864 (10th Cir. 1953).

2d 243 (Ky. 1959) ("some other person than the employer").

In *Ginnis v. Southerland*, 50 Wash.2d 557, 558, 313 P.2d 675, 676 (1957), the court, construing the Longshoremen's and Harbor Workers' Compensation Act, and denying the longshoreman any right to sue the master of the vessel as a third party, said:

The privity between principal and agent is expressed in the ancient maxim *qui facit per alium facit per se*. Therefore, the master's negligent act was the act of the Grace Lines, Inc., and appellants were not injured by the act of *some person other than the employer*. It follows that the appellants cannot maintain their actions against the master because he is the agent of their employer, the Grace Lines, Inc., and is included in its immunity from liability.

And in *White v. Ponozzo*, 77 Idaho 276, 280, 291 P.2d 843, 845 (1955), the court expressed it this way:

[T]he co-employee becomes merged in the employer and is not a third person, within the meaning of the compensation law, against whom a damage action may be maintained.

The courts have generally stressed the manner in which the allowance of suits against co-employees would frustrate the policy of the compensation acts. This was well expressed in *Doane v. E. I. DuPont De Nemours & Co.*, 209 F.2d 921, 923, 924 (4th Cir. 1954) where the court said:

It seems clear that it was the legislative intent to make the act exclusive in the industrial field, so that, in the event of an industrial accident,

the rights of all those engaged in the business would be governed solely thereby.

* * *

If the contention of defendant in error is sustained (that is—that “other party” refers to and includes a fellow servant), then the employee’s right against the fellow servant is assigned by the act to the employer or the compensation insurance carrier. It would follow that the act would not cover the entire field of industrial accidents because common-law litigation would inevitably arise in cases where the injury or death was due to the negligence of another employee. Instead of the loss of such industrial accidents being cast upon business as an expense thereof, the wages of fellow workmen will become an ultimate insurance fund for the exoneration of both industry and compensation insurance carriers for the ultimate loss. Instead of providing relief to workmen, it will place in the power of employers and compensation insurance carriers the right to recoup from workmen loss which should be borne by the business.²³

The compelling reasons for the policy of the compensation acts in denying suit against a co-employee as a “third party” were also very well explained in the following language from *O’Brien v. Rautenbush*, 10 Ill.2d 167, 174, 139 N.E.2d 222, 226 (1956):

Under the present act an employee who is injured by a coworker need no longer overcome the time-honored fellow-servant doctrine nor rely entirely upon the solvency of the tort-feasor, but

²³Quoting *Feitig v. Chalkley*, 185 Va. 96, 102, 104, 38 S.E.2d 73, 75, 76 (1946).

he is assured of immediate, certain relief without the necessity of costly and tedious litigation. Furthermore, if he is unfortunate enough to *cause* the injury of a coemployee, he need not fear the extreme financial burden which might otherwise be forced upon his shoulders by the employer or injured employee. On the other hand, if plaintiff's assertions are correct, an employee who has inadvertently injured a fellow worker would be forced to bear the sole cost of defending and satisfying the common-law action without any part of the cost being passed on to the industry, since the common employer's liability is expressly limited to the compensation award. (Ill. Rev. Stat. 1955, chap. 48, par. 138.11). In view of the fact that a considerable portion of industrial injuries can be traced to the negligence of a co-worker, such litigation could reach staggering proportions, and would not only tend to encourage corrupt and fraudulent practices but would also disrupt the harmonious relations which exist between coworkers. The avoidance of such results is most certainly beneficial to the employee.

The plaintiff argues that no reason exists for differentiating between a negligent coworker and an employee of a separate enterprise. Yet he fails to point out that the same unfortunate results do not occur when an injured employee sues a tort-feasor who is engaged by different management. In this later [sic] situation, the tort-feasor's employer would quite likely be personally liable and could be expected to undertake the defense at his own and the industry's expense, and, in addition, the employee relationships of the particular business would in no way be disturbed.

The rights of the Government and the injured employee against responsible third persons are prescribed by §26 (5 U.S.C. §776) (Appendix). It is elementary that when the Congress has occupied the field by legislation such as this, no recovery may be had outside the terms prescribed. This rule is directly applicable to third-party suits under §26; in *United States v. Klein*, 153 F. 2d 55, 59 (8th Cir. 1946), the court, in dealing with a third party claim under §26, said:

We are of the view that the statutory provisions above referred to furnish the exclusive remedy and that resort cannot be had to any common-law remedies. . . . Where an Act of Congress deals with the subjects to which it relates, that Act is paramount and exclusive, and recovery, if at all, must be had in the mode and by and for the persons, and for the reasons, designated in the Act.

Again, in *Louisville & Nashville R. R. Co. v. Rochelle*, 252 F. 2d 730, 735 (6th Cir. 1958) the court, in discussing rights against a third party, said:

Under 5 U.S.C. §751 et seq., . . . the rights of the claimant are governed exclusively by the statutory provisions and the Regulations promulgated thereunder.²⁴

Under the provisions of §§26 and 27 of the Act, which regulate third party actions, the employee receiving an award of compensation for an injury "caused under circumstances creating a legal liability

²⁴The regulations referred to appear at 20 C.F.R. §§3.1-3.6.

upon some person other than the United States to pay damages therefor" may be required to assign his right of action against such person to the United States. In case the employee is allowed to sue such other person in his own name, provision is made for the reimbursement of the United States out of any recovery. Thus the United States either brings the third party suit itself or at all times is entitled to compel assignment of the plaintiff's claim and is a lienor to the extent of the compensation it has paid.

In the light of *United States v. Gilman*, 347 U.S. 507, (1954), the Bureau of Employees Compensation of the Department of Labor does not demand assignments in cases like the present one, where no person outside the Government service has caused the injury, since no recovery can be had in such a case. Accordingly, no assignment was taken or required by the Bureau as a condition to the payment of Appellant Russell's compensation.

In the *Gilman* case, the Supreme Court held that the United States may not recover over against one of its employees after it has been held liable under the Federal Tort Claims Act. In rejecting the Government claim for indemnity, the Court reviewed the considerations involved, in this language:

The relations between the United States and its employees have presented a myriad of problems with which the Congress over the years has dealt. Tenure, retirement, discharge, veterans' preferences, the responsibility of the United States to some employees for negligent acts of other em-

ployees—these are a few of the aspects of the problem on which Congress has legislated. Government employment gives rise to policy questions of great import, both to the employees and to the Executive and Legislative Branches. On the employee side are questions of considerable import. Discipline of the employee, the exactions which may be made of him, the merits or demerits he may suffer, the rate of his promotion are of great consequence to those who make government service their career. The right of the employer to sue the employee is a form of discipline. Perhaps the suits which would be instituted under the rule which petitioner asks, would mostly be brought only when the employee carried insurance. But the decision we could fashion could have no such limitations, since we deal only with a rule of indemnity which is utterly independent of any underwriting of the liability. Moreover, the suits that would be brought would haul the employee to court and require him to find a lawyer, to face his employer's charge, and to submit to the ordeal of a trial. The time out for the trial and its preparation, plus the out-of-pocket expenses, might well impose on the employee a heavier financial burden than the loss of his seniority or a demotion in rank. When the United States sues an employee and takes him to court, it lays the heavy hand of discipline on him, as onerous to the employee perhaps as any measure the employer might take, except discharge itself. (347 U.S. at 509.)

The Court then went on to say:

On the government side are questions of employee moral and fiscal policy. We have no way

of knowing what the impact of the rule of indemnity we are asked to create might be. But we do know the question has serious aspects—considerations that pertain to the financial ability of employees, to their efficiency, to their morale. These are all important to the Executive Branch. The financial burden placed on the United States by the Tort Claims Act also raises important questions of fiscal policy. A part of that fiscal problem is the question of reimbursement of the United States for the losses it suffers as a result of the waiver of its sovereign immunity. Perhaps the losses suffered are so great that government employees should be required to carry part of the burden. Perhaps the cost in the morale and efficiency of employees would be too high a price to pay for the rule of indemnity the petitioner now asks us to write into the Tort Claims Act. (347 U.S. at 510)

The Court, in finally rejecting the claimed right to sue the employee, reviewed its own earlier refusal to extend the common law action of *per quod servitium amisit* to the Government-soldier relation²⁵ and then concluded:

The reasons for following that course in the present case are even more compelling. Here a complex of relations between federal agencies and their staffs is involved. Moreover, the claim now asserted, though the product of a law Congress passed, is a matter on which Congress has not taken a position. It presents questions of policy on which Congress has not spoken. The selection of that policy which is most advantageous

²⁵*United States v. Standard Oil Co.*, 332 U.S. 301 (1947).

to the whole involves a host of considerations that must be weighed and appraised. That function is more appropriately for those who write the laws, rather than for those who interpret them. (347 U.S. at 511)

We can perceive no distinction between compensation payments and tort damage payments in this respect; the ruling in *Gilman* forecloses recovery from the co-employee in compensation cases. The present cases are unprecedented in that the beneficiary of compensation has himself sued his co-employees and attempted to treat them as third parties and to recover a judgment from which he would have to reimburse the United States, under §27 of the Act, for the compensation it has paid him. It would be strange indeed if *Gilman* could be circumvented in this manner.

In holding that the Federal Employees Compensation Act is the exclusive remedy of employees situated exactly as Appellant Russell is, without the assistance of any statutory language, the Supreme Court, in *Johansen v. United States*, 343 U.S. 427, 440, 441, 1952 A.M.C. 1043, 1053, said:

Such a comprehensive plan [federal employees compensation] for waiver of sovereign immunity, in the absence of specific exceptions, would naturally be regarded as exclusive.

* * *

All in all we are convinced that the Federal Employees Compensation Act is the exclusive remedy for civilian seamen on public vessels. As the Government has created a comprehensive system to

award payments for injuries, it should not be held to have made exceptions to that system without specific legislation to that effect.

Just as, in the absence of a statutory provision, the Supreme Court has held that an employee may not sue the United States and that the United States may not sue the employee who injures another and imposes a financial burden upon the Government, so the same rationale precludes the employee from recovering against his co-employee and then repaying the United States as subrogee what it could not have recovered directly by any right of its own. Neither a Government employee, covered by the Federal Employees Compensation Act, nor anyone else on his account, may sue other employees or agents of the Government for a service-connected injury. As the Supreme Court pointed out in the *Gilman* case, the matter of dealing with the responsible Government employees is essentially a disciplinary matter, for which there are regular administrative procedures and which should not be attempted through a lawsuit. Certainly it is not to be handled by a lawsuit brought at the whim of the injured co-employee.

III

APPELLANTS HAVE NO CAUSE OF ACTION FOR LIBEL OR SLANDER

Although Appellants have added to their principal claim of assault and battery in the California case (No. 15,680 in this Court) some ancillary claims of

libel and slander, it is apparent that all of the statements charged as defamatory were absolutely privileged and can not be the subject of an action for damages.

The record shows that the defamation charged is directed at statements given by Appellees Cunningham and Tschirgi to official investigators of the Navy Department, and at reports or testimony, or both, in connection with official disciplinary actions against Russell.²⁶ The United States and the Cliff House are also charged with liability for these statements.

There is plainly no substance whatever to these charges of defamation. It is settled law that such official reports by Government employees in connection with disciplinary matters or official inquiries or investigations are absolutely privileged. *De Arnaud v. Ainsworth*, 24 App. D.C. 167 (1904); *Farr v. Valentine*, 38 App. D.C. 413 (1912); *Mellon v. Brewer*, 18 F.2d 168 (D.C. Cir. 1927) cert. denied 275 U.S. 530; *Newbury v. Love*, 242 F.2d 372 (D.C. Cir. 1957) cert. denied 355 U.S. 889; *Lyons v. Howard*, 250 F.2d 912 (1st Cir. 1958) rev'd on other grounds (i.e. that C.A. did not extend privilege far enough) sub nom. *Howard v. Lyons*, 360 U.S. 593 (1959). See *Annotation*, 45 A.L.R. 2d 1296, particularly at 1305-1308.

Complaint is also made of reports to the Guam police.²⁷ Such reports were plainly privileged in the

²⁶See Complaint, Paragraphs 11-14, 26, 27 (Cal. R. V. 1, pp. 5-6, 9) and Guam R. p. 40, line 18 and p. 49, lines 18-19.

²⁷See Complaint, Paragraph 26 (Cal. R. V. 1, p. 9).

public interest in law enforcement and complete disclosure of facts for this purpose. *Vogel v. Gruaz*, 110 U.S. 311 (1884).

Clearly, therefore, all of the allegedly defamatory statements were privileged and cannot be made the subject of an action for damages.²⁸ It may be noted in passing that the United States and its instrumentality, the Cliff House, are obviously protected from suit by the Federal Tort Claims Act exceptions in 28 U.S.C. §2680(h).

IV

THE DISTRICT COURT PROPERLY DISMISSED THE CALIFORNIA CASE FOR LACK OF JURISDICTION IN THE EXERCISE OF ITS POWERS TO CONTROL ITS BUSINESS AND PREVENT ABUSIVE MULTIPLICITY OF SUITS

It is apparent on the face of the Complaint in California action No. 34558 (No. 15,680 in this Court),

²⁸If, as Appellants claim, the statements of Appellees had been malicious and untrue, the proper course would be a disciplinary proceeding against the offenders. Civilian employees of the Navy are subject to Navy Civilian Personnel Instructions (NCPI), a body of regulations issued under authority of R.S. 161 (as amended, 5 U.S.C. §22). NCPI 45.2-4 provides in part as follows:

Irresponsible Statements Made By Employees

a. General.—It is recognized that an employee, in expressing a grievance, in responding to charges or to statements by others, or in other situations, may express himself in an intemperate manner, orally or in writing. . . . In any case, an individual making such statements may be held responsible for them. . . .

The Standard Schedule of Disciplinary Offenses and Penalties included in NCPI 45.10-1 provides, at Item 23, for penalties ranging from reprimand to removal for "making false or unfounded statements which are slanderous or defamatory about other employees or officials". The appropriate authority with respect to a naval officer would be the Uniform Code of Military Justice, Articles 107, 133.

that the District Court for the Northern District of California had no jurisdiction. For reasons which have already been discussed, there was no Federal Tort Claims Act jurisdiction.²⁹ Diversity jurisdiction was plainly lacking.³⁰ Federal question jurisdiction was also lacking, so far as appeared in the Complaint and record before the California District Court at the time of dismissal.³¹

Moreover, it appeared from the record that the jurisdiction of the District Court of Guam over the action there against Defendant Cunningham was unquestioned, and that, as to the other Defendants in

²⁹See footnotes 2 and 3 *supra* and text at footnote 20 *supra*.

³⁰See footnote 3 *supra*.

³¹We have chosen in this Court to meet the case on the "merits" by invoking the Federal Employees Compensation Act and pointing out Appellants' complete lack of any right to the recovery sought. If the Federal Employees Compensation Act had been directly put in issue in the District Court, in relation to Appellants' claims against the individual defendants there, then perhaps a colorable claim to federal question jurisdiction under 28 U.S.C. §1331 would have appeared of record. The mere formal statement in the Complaint (Cal. R. V. 1, p. 2, line 25 to p. 3, line 1) invoking such jurisdiction is not enough. *Norton v. Whiteside*, 239 U.S. 144, 147 (1915); *South Side Theatres v. United West Coast Theatres Corp.*, 178 F.2d 648, 649 (9th Cir. 1949) ("The statement of facts upon which the existence of federal jurisdiction depends must affirmatively and distinctly appear in the plaintiff's complaint."); See Form 2(b), F.R.C.P. And the anticipation of defenses in the complaint, or even the actual statement of them in the answer will not suffice to confer federal question jurisdiction. *Gully v. First National Bank*, 299 U.S. 109, 113 (1936). Implied reliance upon the laws of Guam would not avail Appellants since laws of the territories are not "laws . . . of the United States". *Maxwell v. Federal Gold & Copper Co.*, 155 Fed. 110, 112 (8th Cir. 1907); *Adams Exp. Co. v. Denver & R.S. Ry. Co.*, 16 Fed. 712, 715 (C.C.Colo. 1883); cf. *Puerto Rico v. Rubert Hermanos, Inc.*, 309 U.S. 543, 550 (1940); *American Security & Trust Co. v. Commissioners of the District of Columbia*, 224 U.S. 491, 495 (1912).

California action No. 34558 (No. 15,680 in this Court), there was nothing in the case to present any better claim to jurisdiction than what had been established in the earlier California actions (34549 and 34815). Even in cases of potential concurrent jurisdiction, the Court which takes jurisdiction in the first of successive actions acquires an exclusive jurisdiction in that action. *French v. Hay*, 22 Wall. 250, 253 (1875); *Ex Parte City Bank of New Orleans*, 3 How. 292, 314 (1845). Accordingly, upon this ground also, no jurisdiction was acquired by the District Court in California case No. 34558 (No. 15,680 in this Court). The maintenance of that action, the last to be filed, was prima facie vexatious. *Higgins v. California Prune & Apricot Growers*, 282 Fed. 550, 557 (2nd Cir. 1922).

The record below included the particulars of the earlier cases pending and showed that any rights of Appellants claimed in this later case were adequately protected in the earlier suits. The District Court plainly had in mind the exclusiveness of the compensation remedy and of the jurisdiction acquired in the earlier actions. Just as the Court in the earlier action may take the usual course, followed in the *Higgins* case, *supra*, and enjoin the prosecution of the later action, so the court having the later actions, or a single court having two or more actions on the same subject matter between the same parties, may simply dismiss the later action for lack of jurisdiction. That it may and should dismiss *sua sponte*, where it lacks jurisdiction, is surely settled doctrine in the Federal courts.

Since the record below disclosed no basis of jurisdiction, dismissal of California action No. 34558 (No. 15,680 in this Court) was entirely proper. And since any rights of Appellants were protected in other actions, it was proper that the dismissal be without leave to amend.

CONCLUSION

For the foregoing reasons we submit that the Guam appeal, No. 15,450, should be dismissed for want of jurisdiction in this Court and that the judgment of the District Court in the California appeal, No. 15,680, should be affirmed.

Respectfully submitted,

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(Appendix Follows.)



Appendix.



Appendix

STATUTES INVOLVED

At the time this action was filed, 28 U.S.C. §1331 provided in pertinent part:

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$3000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

At the time this action was filed, 28 U.S.C. §1332 provided in pertinent part:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$3,000, exclusive of interest and costs, and is between—

- (1) citizens of different States;
- (2) citizens of a State, and foreign states or citizens or subjects thereof; and
- (3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

The Federal Employees Compensation Act of September 7, 1916, c. 458, 39 Stat. 742, as amended, provides in pertinent part:

§26 (5 U.S.C. §776):

If an injury or death for which compensation is payable under this chapter is caused under circumstances creating a legal liability upon some

person other than the United States to pay damages therefor, the commission may require the beneficiary to assign to the United States any right of action he may have to enforce such liability of such other person or any right which he may have to share in any money or other property received in satisfaction of such liability of such other person, or the commission may require said beneficiary to prosecute said action in his own name.

If the beneficiary shall refuse to make such assignment or to prosecute said action in his own name when required by the commission, he shall not be entitled to any compensation under this chapter.

The cause of action when assigned to the United States may be prosecuted or compromised by the commission, and if the commission realizes upon such cause of action, it shall apply the money or other property so received in the following manner: After deducting the amount of any compensation already paid to the beneficiary and the expense of such realization or collection, which sum shall be placed to the credit of the employees' compensation fund, the surplus, if any, shall be paid to the beneficiary and credited upon any future payments of compensation payable to him on account of the same injury.

§27 (5 U.S.C. §777):

If an injury or death for which compensation is payable under this chapter is caused under circumstances creating a legal liability in some person other than the United States to pay damages therefor, and a beneficiary entitled to compensa-

tion from the United States for such injury or death receives, as a result of a suit brought by him or on his behalf, or as a result of a settlement made by him or on his behalf, any money or other property in satisfaction of the liability of such other person, such beneficiary shall, after deducting the costs of suit and a reasonable attorney's fee, apply the money or other property so received in the following manner:

(A) If his compensation has been paid in whole or in part, he shall refund to the United States the amount of compensation which has been paid by the United States and credit any surplus upon future payments of compensation payable to him on account of the same injury. Any amount so refunded to the United States shall be placed to the credit of the employees' compensation fund.

(B) If no compensation has been paid to him by the United States, he shall credit the money or other property so received upon any compensation payable to him by the United States on account of the same injury.

§42 (as amended, 5 U.S.C. §793):

* * *

The action of the Secretary or his designees in allowing or denying any payment under this Act shall be final and conclusive for all purposes and with respect to all questions of law and fact, and not subject to review by any other official of the United States, or by any court by mandamus or otherwise



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UNITED STATES OF AMERICA,
Appellee.

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NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF FOR APPELLEE

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BRIEF FOR APPELLEE

JURISDICTION

Appellee accepts appellant's jurisdictional statement (Br. 1-2).*

* While appellee does not move to dismiss the appeal for failure of appellant to file his brief within the time allowed by the Rules of this Court, we direct the Court's attention to the fact (for such action, if any, as the Court, on its own motion, may desire to take) that appellant's brief was in fact, apparently, not timely filed.

Our files reflect that counsel for appellant, on October 29, 1957, mailed to this Court for filing a

QUESTIONS PRESENTED

1. Whether the two-witness perjury rule applies to a prosecution under 18 U.S.C. 1001 for filing a false non-Communist affidavit with the National Labor Relations Board.

2. Whether appellant could have been prejudiced by the alleged duplicity and multiplicity of the indictment, in view of the fact that he was given concurrent sentences on the several counts.

3. Whether the innocent error of government counsel in framing one of the questions asked on cross-examination of one of appellant's character witnesses warrants, under all the circumstances (including the fact that the question and answer were stricken and the jury instructed to disregard the matter entirely), the granting of a new trial.

"Motion to Fix Time for Filing and to Extend Said Time," in which he moved the Court to "set the time for the filing of the brief of appellant in this case on November 15, 1957, and if necessary to extend said time now allowed." In an accompanying affidavit, counsel attested that he had not received the transcript of record in this case until on or about October 5, 1957, and stated that he believed he would be able to file his brief "on or about November 15, 1957." We have been advised by the Clerk that, as of November 21, 1957, the foregoing motion had not been acted on by the Court and appellant's brief had not been filed. The brief was finally filed on or about December 4, 1957. See Rule 18(1) and (7) of the Rules of this Court.

COUNTERSTATEMENT OF THE CASE

Count I of a six-count indictment (Tr. 781-782)¹, returned in the United States District Court for the Western District of Washington, charged appellant with having falsely attested, in an affidavit filed with the National Labor Relations Board on June 29, 1951, that he was not as of the date of the affidavit a member of the Communist Party, in violation of 18 U.S.C. 1001 and Section 9(h) of the National Labor Relations Act, as amended by the Labor Management Relations Act of 1947 (29 U.S.C. 159(h)). Count II charged that he falsely attested in the same affidavit that he was not affiliated with the Party. Counts III and IV charged that he falsely denied membership and affiliation, respectively, in the Party in a second affidavit, filed July 11, 1952. The remaining counts — V and VI — are no longer involved herein.²

Following a trial by jury, appellant was found guilty on each of these four counts, but on appeal to this Court, the judgment of conviction was set aside

¹ "Tr." will be used herein to refer to the official transcript of the court reporter. "Ex." will refer to Government exhibits.

² Counts V and VI charged false denial of membership and affiliation, respectively, in a third affidavit, filed June 3, 1953. Appellant was acquitted on both these counts at his former trial.

and a new trial ordered because of trial errors relating to exclusion of evidence and the instructions to the jury. *Fisher v. United States*, 231 F. 2d 99. Appellant was thereafter retried and, on March 21 1957, was again convicted on all four counts (Tr. 812-815). He was sentenced to five years imprisonment on each count, to run concurrently. The present appeal is from this second conviction.

The evidence adduced by the Government at appellant's second trial may be summarized as follows:

It was established at the trial, and is not disputed, that appellant, as an officer of Local 2-93 (now 23-93) of the International Woodworkers of America, located in Sultan, Washington (Exs. 3 and 4; Tr. 87-99, 107-108, 100-101), executed and caused to be filed with the National Labor Relations Board the two affidavits on which the four counts here involved are founded (Exs. 1 and 2; Tr. 96, 125-126, 132-133).

The Evidence of the Falsity of Appellant's Affidavits

The Government adduced a wealth of evidence tending to indicate that appellant, from a time antedating the filing of the first of his two affidavits here involved (June 29, 1951) to and beyond the date of the filing of his second affidavit (July 11, 1952), was at all times a member of the Community Party. That evidence is summarized hereinbelow:

(a) *Evidence antedating the first affidavit (filed June 29, 1951).* — In April 1944, appellant attended a convention of District 2 of the International Woodworkers of America, Northern Washington Council (Tr. 193). At this convention he approached a fellow member of the International Woodworkers, Walter H. Swinhart, with a "proposition" which he requested Swinhart to keep confidential (Tr. 210). After being assured by Swinhart that he would do so, appellant discussed with Swinhart the nature and aims of the Communist Party (Tr. 210). Appellant argued that "the object of the Communist Party wasn't so much to communize a nation as to force a modification of our present capitalistic system" (Tr. 210). During the ensuing conversation, which lasted approximately an hour, appellant urged Swinhart to join the Communist Party (Tr. 210). After Swinhart agreed to do so (Tr. 210), appellant suggested that Swinhart pay ten dollars either as an initiation fee or as dues or as a combination of both (Tr. 211). Swinhart gave appellant the amount suggested and in return received a Communist Party membership card by mail (Tr. 211). In July or August of 1944, Swinhart saw appellant in a logging camp near Mineral, Washington (Tr. 212). They had several conversations during which there was "some discussion about the Communist Party," including the

question of whether Swinhart was paid up in his Party dues (Tr. 213-214).

In February 1945, appellant attended a meeting of the Communist Political Association³ in the Clark Building in Everett, Washington (Tr. 252, 254).⁴ This was a meeting of some ten or eleven persons, mostly woodworkers, who were addressed by one Karly Larsen, a member of the Communist Political Association and later a member of the District Executive Board of the Northwest District of the Communist Party⁵ (Tr. 254, 464). Later in the same year, appellant attended another Party meeting of the Everett

³ The Communist Party was called the Communist Political Association for a period of approximately a year in the period 1944-1945 (Tr. 253-254).

⁴ Party meetings were open to Party members only, except for occasional open branch meetings to which prospective recruits were invited (Tr. 519-520). To be admitted to a Party meeting a person had to be known to the Party leadership present at the meeting (Tr. 520-522, 552-555). Even a Party membership card was not sufficient to gain admittance if the bearer was not also known as a Party member to those in attendance (Tr. 524-525).

⁵ The District Executive Board, the executive body of the District Committee, was the body "responsible for the Party in every way between District Committee meetings" (Tr. 462-463). The District Committee was elected at District Conventions as the "leading and responsible body of the party at all times in between conventions" (Tr. 461).

Club, held in the same building (Tr. 583-584). Margaret Nygren, a Party member who was at one time in charge of the Everett region (Tr. 257), introduced appellant to Mazie Mores, a former Party member who had rejoined at the request of Federal Bureau of Investigation (Tr. 572-575), as "Comrade Fisher" (Tr. 583-584).

In late 1945 appellant became a member of the Party's Northwest District Committee (Tr. 471, 550), the governing group for the District, which was made up entirely of Party members (Tr. 462). He was chosen for this position because, "besides general qualifications of being a Communist Party member who had carried out his responsibilities well, * * * he held an important labor position, which would give him an opportunity to influence many workers and other people * * *" (Tr. 471-472). After his election he attended Committee meetings regularly from late 1945 until early 1947, and he continued to attend such meetings, though less frequently, during the rest of 1947 (Tr. 472). He served as a member of the District Committee for about two years, until early 1948, at which time the Party drastically reduced the Committee's membership (Tr. 473). This reduction was the result of the Party's belief that persons in "mass positions", such as in labor or political work, "should not be exposed to being known to too many

people as Communists", and, further, that the "Committee should not be too large in the event of prosecution" (Tr. 473).⁶

In March 1946, appellant attended an emergency meeting of the Northwest District Committee, which was held for the purpose of organizing a "Win the Peace" conference (Tr. 475-476). The purpose of the conference was to protest a speech made by Winston Churchill proposing an Anglo-American military alliance against the Soviet Union (Tr. 475-476). All the persons attending the Committee meeting were Party members (Tr. 475). The meeting was addressed by Henry Huff, who made the main report, Andrew Remes⁷, who spoke on the "Win the Peace" campaign, and appellant, who spoke on sponsorship of "Win the Peace" conferences (Tr. 476). Since "major sponsorship" was needed, appellant stated that he would be willing to sponsor such a conference and that he would attempt to persuade other labor officials to be spon-

⁶ At this same time, as part of its program of clandestine operation, the Party decided to collect and destroy outstanding membership cards nationally and to reduce the size of all branches and sections in order to keep the identity of its members secret (Tr. 474-475).

⁷ In the transcript, "Remes" is incorrectly spelled "Reems."

sors (Tr. 476). The conference was in fact held about a week later (Tr. 476-477).

In June 1946, appellant attended a two-county Communist Party meeting in Vassa Hall, Everett, Washington (Tr. 256-257). All of the thirty-five persons present were Party members, the meeting not being open to others (Tr. 256, 346-348). To ensure that no non-Communists were admitted, participants were checked at the door. (Tr. 347-348). The meeting was addressed by Party members Laurange Kratler, Margaret Nygren, and Frank Patterson (Tr. 256-257, 597-598).

In February 1948, appellant spoke to an enlarged District Executive Board meeting⁸ at the home of William K. Dobbins (Tr. 477, 551), a member of the Executive Board (Tr. 464, 477). Those in attendance were checked in the customary manner to ensure that all were Party members (Tr. 479, 552-555). Two matters were discussed at the meeting — the deportation proceedings which had been brought against Ferdinand Smith, an official of the National Maritime

⁸ An enlarged District Executive Board meeting is a meeting of the Executive Board to which one or more other Party members, leaders in a particular field, are invited (Tr. 477, 551). Appellant was not then a member of the District Committee or District Executive Board (Tr. 478).

Union, and the investigation of the Washington Pension Union by the Canwell Committee⁹ (Tr. 478). The meeting was addressed by Henry Huff (Tr. 478), the Chairman of the Party's Northwest District and a member of the District Executive Board (Tr. 263, 464), and by appellant (Tr. 479). Huff stressed the seriousness of the investigation by the Canwell Committee and outlined a program to combat it (Tr. 478). He also urged the necessity of the Party's protesting against other deportation proceedings against Party officials which were being held contemporaneously with the proceedings against Smith (Tr. 478-479). In his speech, appellant castigated the investigation of the Pension Union by the Canwell Committee as "really an attack on the whole labor movement" and as an attempt "to drum up an hysterical atmosphere in which it would be possible to start another prosecution of Harry Bridges, the longshore leader" (Tr. 479).

In the spring of 1948, appellant was present at an enlarged Executive Board meeting which discussed the policy of concentrating Party activity of the District in the lumber, aircraft, and marine industries (Tr. 482-483). After the discussion, Barbara Hartle, the organizer of the South King County Region and a member of the District Committee and Ex-

⁹ A committee of the Washington State Legislature.

ecutive Board (Tr. 461, 464-465), mentioned that she was having trouble finding transportation to Enumclaw, Washington, where she was to attend a Party branch meeting (Tr. 483-484). Appellant told Mrs. Hartle that he had Party business of his own in that area and promised to drive her there (Tr. 483-484). Accordingly, a few days later, appellant drove Mrs. Hartle to Enumclaw (Tr. 484). On the way Mrs. Hartle told appellant that she was going to the house of Bob Blakely, a Party member; appellant, without further direction, drove her to Blakely's house (Tr. 484-485). At Blakely's house appellant greeted Blakely and then left (Tr. 485). Several hours later appellant returned and, after talking to some Party members, drove Mrs. Hartle back to Seattle (Tr. 485).

In May 1948, appellant participated in a meeting of the International Woodworkers of America "fraction"¹⁰ in Seattle (Tr. 479-480, 550-552). Those attending the meeting were checked to make sure that only Party members were present (Tr. 552-555). The purpose of the meeting was to receive directions from the Party's District leadership with respect to raising \$30,000, which had been set as the amount to be col-

¹⁰ A "fraction" is the "membership of the Communist Party in another organization", such as the Party members who belong to a particular labor union (Tr. 480).

lected in an extensive campaign which was being waged against passage of the Mundt-Nixon bill (Tr. 480-481). Appellant made a speech in which he stated that he would be going to Washington, D. C., in his capacity as a labor leader, to fight the bill (Tr. 481). Several weeks later appellant did go to Washington for this purpose (Tr. 481).

On January 1, 1949, appellant attended an enlarged District Committee meeting in the Frye Hotel in Seattle (Tr. 257-258, 485-487). Appellant and Stan Hendrickson, another Party member who was at one time the Party organizer in Everett (Tr. 598), were driven to the meeting by Harley Mores, who, like his wife, Mazie Mores, was a former member of the Party who had rejoined at the request of the Federal Bureau of Investigation (Tr. 235-237, 258). Mores drove first to the Frontier Bookstore, the Party bookstore which "had been directed to us in the region and the clubs * * * [as] the place to pick up our literature" (Tr. 258-259). Appellant, Mores, and Hendrickson went into the bookstore, where Hendrickson, in the presence of Mores and appellant, asked the woman who ran the store where the Communist Party meeting was to be held (Tr. 259-260). The three, following her instructions, went to the Frye Hotel (Tr. 260). At the hotel Hendrickson, again in the presence of appellant, asked Ralph Hall, "What floor will the Com-

munist Party meeting be on?" (Tr. 260, 263). Appellant, Mores, and Hendrickson, pursuant to Hall's directions, proceeded to the second floor, where, before they were permitted to enter the room where the meeting was to be held, they were checked against a list to ensure that only Party members whose names appeared on the list attended the meeting (Tr. 263, 486-487).¹¹

This meeting at the Frye Hotel was a particularly urgent one since Henry Huff, the District leader, had just returned from a meeting of the Party's National Committee in New York City and had an important report to deliver in regard to the Party's position *vis-à-vis* the labor movement (Tr. 487-488, 263). It was because of the presence of this topic on the agenda that Party members in the labor movement who were not members of the District Committee were permitted to attend (Tr. 488). A second purpose of the meeting was to protest against the trial of the Party's national leaders for violation of the Smith Act, which was about to start in New York, for the purpose of attempting to force the Government to abandon the prosecution (Tr. 488; see *Dennis v. United States*, 341 U.S. 494). The meeting was ad-

¹¹ An additional security measure was the rental of the room in the name of a garden club (Tr. 487).

dressed by Clayton Van Lydegraf, the Party's District Organizational Secretary and a member of the District Committee and Executive Board, as well as by Huff (Tr. 265-266, 464).

In late 1949 or early 1950, Mrs. Hartle had two personal conferences with appellant in connection with her work as an officer of the Northwest District Negro Commission of the Communist Party (Tr. 465-466, 488). The conversations took place a few weeks apart with only Mrs. Hartle and appellant present (Tr. 489). At the first meeting Mrs. Hartle outlined to appellant the program which had been adopted by the Negro Commission and the District Board in regard to Negro work (Tr. 489). Mrs. Hartle stressed that the Negro work had to be pushed in the three industries in which the Party was concentrating its efforts in the Northwest (Tr. 489-490). She told appellant that it was "his main responsibility" to advance the Party's program of opening up job opportunities for Negro workers in the lumber industry (Tr. 490). Appellant, according to Mrs. Hartle, accepted these statements as a Party member, responsive to orders and subject to Party discipline, without any need on her part to persuade him to follow her instructions (Tr. 491). Appellant said "that he approved the program, and that he would do all that he could to carry it out" (Tr. 491). The purpose of the

second meeting was to check up on the progress that had been made (Tr. 491-492).

On June 30, 1950, two police officers investigating an accident involving an automobile driven by appellant found more than a hundred pamphlets in his automobile (Tr. 172, 177-178, 188). The word "Communism" appeared on the front of these pamphlets in three-quarter-inch block letters (Tr. 179, 188). In addition, the police officers found some books written by Karl Marx and a book entitled *Under the Red Star* (Tr. 180).

Later in 1950, a Party leader came to Harley Mores' house to ask Mores to go with him and show him where appellant was living (Tr. 443). Finding appellant in his bunk house, the Party leader asked appellant for his Party dues (Tr. 443). Appellant answered that he had not yet been paid and that he would leave the money at Mores' house at a later time — which he did (Tr. 443).

In August or early September 1950, appellant attended a Party meeting in Mores' house (Tr. 594), and in September 1950, appellant went to Mores' house to pay Mores his Party dues in the amount of \$12. On the same occasion, appellant gave Mores \$2, which Stan Hendrickson had left with appellant as a contribution to the *People's World*, a Party newspaper

(Tr. 267, 444-445, 592-593, 596). Appellant told Mores that he had been given a non-Communist affidavit and that he wished to see either Stan Hendrickson or Mel Radington concerning it (Tr. 267, 593). Mores told appellant that "the Communist Party had threshed out the affidavit," but appellant said he still wanted to see Hendrickson or Radington, as he was new in the area (Tr. 267). Mores told appellant that if appellant was going to Everett he could stop and see the Communist leadership in that area (Tr. 267-268, 593). In particular, Mores told appellant that he should see Verle Hemecke, who had been a member of the Party's Regional Executive Board until the Board had ceased holding meetings (Tr. 268). Since that time, when each Board member was given the responsibility of keeping in contact with a particular area, Hemecke had been in charge of the Everett area, which included the club of which Mores was then chairman (Tr. 268, 271-272). Appellant told Mores that he would see Hemecke about the affidavit (Tr. 269).

(b) *Evidence relating to the period between the filing of the first affidavit (June 29, 1951) and the filing of the second affidavit (July 11, 1952).* — In June 1952, appellant went to Mores' home to discuss an impending local union election (Tr. 270, 597). Appellant gave Mores some handbills to distribute and

told him to get as many Communist Party members as possible to go to the union meeting and vote (Tr. 270-271, 597). He also told Mores that, although Frank Patterson was still doing some Party work, neither Mores nor any other Party member should go anywhere with him since "Patterson didn't represent the Communist Party" and "might be paid by the F.B.I." (Tr. 271, 597). Appellant further told Mores that Verle Hemecke, the Party's section organizer for Everett, should have warned Mores about Patterson (Tr. 598).

(c) *Evidence relating to the period after the filing of the second affidavit (July 11, 1952).* — On December 12, 1952, appellant participated in a Party meeting at Verle Hemecke's home which was also attended by Hemecke, Mores, Mazie Mores, and Stan Hendrickson (Tr. 271-272, 598). That date was the date which had been set for Mores to turn in to Hemecke the Communist Party dues he had collected and to receive his Party orders (Tr. 272). Hemecke told appellant and Mores that because he, Hemecke, was overburdened with Party work appellant was thereafter to run the Sultan and Goldbar areas (Tr. 272-273, 599). Mores was thus to receive his Party orders from appellant (Tr. 272-273, 599). Hemecke also told appellant that he (appellant) and Stan Hen-

drickson were to assist Mores in reorganizing Communist Party clubs in the area (Tr. 273, 599).

On December 26, 1952, appellant was present at a regular meeting of the Goldbar Club, held at Mores' house. This meeting was also attended by Mores, Mazie Mores, Hendrickson, and Mr. and Mrs. Rantley (Tr. 273-274, 599-600). Appellant was the chairman of the meeting (Tr. 600). Pursuant to Hemecke's orders to appellant to direct Mores' Party activities, appellant gave Mores two documents (Exs. 7, 8; Tr. 273-284, 601-602). One of these documents, which was addressed "to all Clubs and Regions," set the Party goals for the registration drive being held in December 1952 and January 1953. In preparation for a special registration meeting, the document recommended the reading of a number of speeches and writings by, among others, Stalin, Malenkov, and William Z. Foster, as reported or appearing in the Party's theoretical organ, *Political Affairs*, and elsewhere (Ex. 7; Tr. 279-280). The document further proposed a series of goals to be attained, including the completion of registration and the payment of all Party dues through December, the completion of the club's "defense" fund, the fulfillment of the club's quota of "peace" signatures, the securing of at least three new subscriptions to the Party newspaper, *People's World*, the recruitment of at least one new Party member, and the

sending of a communication to "Truman and Eisenhower demanding an immediate cease fire in Korea" (Ex. 7; Tr. 280-281).

The second document which appellant gave Mores at this December 26 meeting was entitled "The Party and the 1952 Registration". Distributed by the District Committee (Ex. 8; Tr. 281, 284), it stated that, although "a few of our comrades" had been sent to prison for violation of the Smith Act, nevertheless, "We welcome and grow in the class struggle" (Ex. 8; Tr. 281-282). It urged all clubs to increase their membership and all Party members to "rally to the defense of our party and around our beloved leaders" (Ex. 8; Tr. 283).

In addition to the two documents which appellant gave to Mores for his own use, appellant gave him two additional copies of each document to deliver to other Party members (Tr. 284). One copy of each document was to be delivered to Norris and Ena Blansett, Party leaders in the area, and the other copy to Kenny Longman, a leader of the Party's Monroe Club (Tr. 284-285, 601).

At this same meeting of December 26, 1952, appellant announced that the Party was in debt in the amount of \$4,500 and that "the smallest that each club had * * * offered to raise was \$200.00" (Tr. 602).

Also at this meeting, Mores paid appellant his own dues and, in addition, "turned some dues in for" other Party members (Tr. 603).

In January 1953, while appellant was still in charge of the Sultan-Goldbar area (Tr. 286-287), he participated in a meeting of the Sultan and Goldbar Clubs, which had previously been merged (Tr. 285). This meeting was attended, in addition, by Mores and by Norris and Ena Blansett (Tr. 285). Appellant questioned Norris Blansett as to whether he had been doing any Party work, and he requested Mores to collect the dues of the members of the Sultan-Goldbar and Monroe Clubs (Tr. 286). Appellant also requested Mores to arrange, within five days, a meeting of certain Party members, whom he proceeded to designate (Tr. 286).

The meeting which appellant requested Mores to arrange was held on January 22, 1953, at Norris Blansett's house. It was attended by appellant, Norris and Ena Blansett, Mores, Mazie Mores, Mr. and Mrs. Rockney,¹² and several others, all of whom were Communist Party members (Tr. 287, 603-604). Appellant told those present that "Stan Hendrickson was supposed to come with him, but the F.B.I. were trail-

¹² In the transcript, "Rockney" is incorrectly spelled "Rantley" or "Routney."

ing him, and he didn't want to come up there and expose them all" (Tr. 604). Appellant read aloud Stalin's speech at the 19th Congress of the Communist Party of the Soviet Union, as printed in the October 1952 issue of *Political Affairs* (Tr. 297, 604). This was one of the recommended readings listed in the document which appellant gave Mores at the meeting of December 26, 1952, *supra* (Ex. 7; Tr. 280). Mores collected dues from all those present and gave the money to appellant (Tr. 288, 290). Mores told appellant that one of the members present, Mrs. Rockney, had said that she "had not meant her membership in the Community Party — in other words, she didn't want [her] church to know she was attending Communist Party meetings" (Tr. 288-289). Mores further told appellant, however, that he had collected dues from Mr. Rockney in two different months for himself and Mrs. Rockney (Tr. 290). Appellant, replying to a query from Mores as to Mrs. Rockney's Party status, stated that "The membership accepts her as a Communist Party member, and I do" (Tr. 290). Appellant also told Mores at this meeting that "We will split the club into two groups" (Tr. 290). Mores proposed that the club be divided into a Goldbar Club and a Winters Lake Club, with four members in each, which proposal appellant accepted (Tr. 290-291).

Appellant's Defense

The evidence for the defense consisted solely of the testimony of four character witnesses (Tr. 654-693) and a number of exhibits, consisting of copies of receipts for funds received from the F.B.I. by Government witnesses Harley Mores and Mazie Mores during the period in which they were acting as confidential informants (Tr. 378-385).

ARGUMENT

I

*The Two-Witness Perjury Rule Does Not Apply
To Prosecutions Under 18 U.S.C. 1001*

Appellant urges that the district court erred in refusing to instruct the jury, in terms of the two-witness perjury rule, that the falsity of the statements made by him was required to be established by the direct testimony of two witnesses or by the testimony of one witness supported by corroborating evidence (Br. 9-20). Concomitantly, he argues, that the Government's evidence, because it was circumstantial in nature, was insufficient to support the verdict (Br. 21-25).

As appellant admits (Br. 11), however, the issue of whether the two-witness perjury rule is applicable to a prosecution under the false statement statute

(18 U.S.C. 1001) for the willful filing of a false non-Communist affidavit has already been decided by this Court, adversely to appellant's present contention, on the former appeal in this case. *Fisher v. United States*, 231 F. 2d 99, 105-106.¹³ Appellant, we submit, has advanced no ground which would warrant the Court in departing from its former ruling. Cf. *Marron v. United States*, 18 F. 2d 218 (C.A. 9), affirmed, 275 U.S. 192.

¹³ Other circuits have reached the same conclusion. *United States v. Killian*, 246 F. 2d 77, 82 (C.A. 7), rehearing granted and cause remanded on other grounds, 246 F. 2d 82; *Gold v. United States*, 237 F. 2d 764 (C.A.D.C.), reversed on other grounds, 352 U.S. 985.

The *Gold* decision was by an equally divided *en banc* court, four judges voting to affirm and four to reverse. There is nothing in the report of the case, however to indicate that any of the judges who voted for reversal other than Judge Bazelon (who alone wrote an opinion) shared Judge Bazelon's view that the two-witness perjury rule applies to a prosecution under 18 U.S.C. 1001 for filing a false affidavit. The other judges who voted to reverse may, so far as is known, have based their votes on other grounds.

In *Hupman v. United States*, 219 F. 2d 243 (C.A. 6), certiorari denied, 349 U.S. 953, a conviction under 18 U.S.C. 1001 for filing a false non-Communist affidavit, based on circumstantial evidence, was affirmed. The court dismissed as "absurd" a contention that direct proof of Party membership on the affidavit-date was necessary (219 F. 2d at 248). The issue of the applicability *vel non* of the

Apart from and in addition to the considerations discussed by this Court in its former opinion (231 F. 2d at 105-106), the instant case, we submit, comes within the recognized "non-objective fact" exception to the two-witness perjury rule. Under that exception, as appellant concedes, "when the statement alleged to be false deals with a non-objective fact such as a mental state, which cannot by its very nature be contradicted by direct evidence, circumstantial evidence will suffice" (Br. 21, and cases cited). Whether appellant was a member of the Communist Party at the time he executed each of the two non-Communist affidavits here in issue — *i.e.*, on or about June 29, 1951, and July 11, 1952 — was an inference of fact to be drawn from the circumstantial proof that he was a member at other times shortly preceding, shortly following, and in between those dates. It was an inference based on the very notion of membership in an organization

two-witness perjury rule appears, however, not to have been raised.

In *Bryson v. United States*, 238 F. 2d 657 (C.A. 9), this Court affirmed a conviction under 18 U.S.C. 1001, based on circumstantial evidence, for false denial of affiliation with the Communist Party. The issue of the applicability of the perjury rule was not raised in this Court, but was urged in Bryson's petition for a writ of certiorari (No. 1065, Oct. Term, 1956 (No. 171, Oct. Term, 1957, pp. 33-35). Certiorari was denied. 78 S.Ct. 20.

and the presumptive continuance of such membership (absent evidence to the contrary) during intervals between points of time in respect of which such status has been directly shown.

It is inconceivable that Congress could have intended to require qualitatively stronger proof of membership on the affidavit-date in a prosecution under 18 U.S.C. 1001 for filing a false affidavit. The strongest conceivable proof that an accused executed a false affidavit of non-membership on a day certain would be testimony by a Party official that he had received the accused into the Party as a member on the preceding day (or even earlier on the same day), had issued him a membership card, and entered his name on the membership rolls. But even in such a case the proof that the accused, contrary to his oath, was a Party member at the moment of execution of his affidavit would, strictly speaking, be circumstantial — *i.e.*, would be based on the inference of continuity of a recently-established status, where there is no evidence tending to indicate its prior termination. And since the evidence, even in such ideal circumstances (from a prosecution standpoint), would still be circumstantial, it follows that Congress cannot reasonably be supposed to have intended to require proof other than circumstantial in a prosecution for filing a false affi-

davit of non-membership.¹⁴ In short, since *direct* proof of membership as of the moment of execution of the affidavit of non-membership would never be available, circumstantial evidence must suffice, else conviction for filing a false affidavit would always be a practical impossibility. The latter alternative is obviously not one which can be attributed to Congress.

II

*Appellant Could Not Have Been Prejudiced By the
Alleged Duplicity and Multiplicity of the Indict-
ment, Since He Was Given Concurrent
Sentences On the Several Counts*

Appellant contends (Br. 25-30) that the indictment was duplicitous and multiplicitous in that it alleged that he was, contrary to his oath, both a member of (counts I and III) and affiliated with (counts II and IV) the Communist Party at the time of filing of each of the two affidavits involved. He argues that the trial court should have required the Government to elect as between counts I and II, on the one hand, and counts III and IV, on the other, or, in the alter-

¹⁴ The two-witness perjury rule is not, of course, a rule of due process, but one which, even in an ordinary perjury case, may be altered, qualified, or abrogated entirely by Congress. *Weiler v. United States*, 323 U.S. 606, 609-610.

native, should have so instructed the jury as to permit it to find him guilty on only one of the first two counts, and, similarly, on only one of the other two. He relies (Br. 26-29) on the statement of this Court in its former opinion in this case, made in connection with its discussion of this identical contention, that "Doubt should be resolved against turning a single transaction into a multiple offense" (*Fisher v. United States, supra*, 231 F. 2d at 103). He ignores, however, the following observations of the Court, which follow immediately after that statement, and which completely refute his present contention (*ibid.*):

However, appellant was only sentenced to five years on each count to run concurrently. The attack on splitting the cause of action would leave at least one good count for each of the three years. This alone does not justify reversal. See *Kiyoshi Hirabayashi v. United States*, 1943, 320 U.S. 81, 85, 105 * * *; *Pinkerton v. United States*, 1946, 328 U.S. 640, 641-642 note 1 * * *.

Since the 5-year prison terms imposed on the several counts were made to run concurrently by the sentence imposed on the retrial as well as by the original sentence, it is evident that the prior decision of this Court completely disposes of appellant's instant contention. Cf. *Marron v. United States, supra*, 18 F. 2d 218 (C.A. 9), affirmed, 275 U.S. 192.

III

*The Innocent Error of Government Counsel In Cross-
Examining of Appellant's Character Witness
Hitchcock Does Not Warrant the Granting
of a New Trial*

Appellant's final contention (Br. 30-46) is that he is entitled to a new trial on the basis of a mistaken assumption which was held by government counsel in his cross-examination of appellant's character witness Hitchcock, and which underlay one of the questions which counsel asked of this witness. It is submitted, however, that while the incident in question was unfortunate, it is far from sufficient, taking all the circumstances into consideration, to warrant the granting of a new trial. The relevant facts, which require detailed statement, are as follows:

During the cross-examination of Mr. Hitchcock, the following occurred (Br. 31-32; Tr. 681-682):

Q. When did Fisher first ask you to appear and testify as a character witness for him?

A. In this —

Q. (Interposing) In the last trial?

A. In the last trial? About fifteen days or so before the trial.

Q. Were you alone when he approached you, or were you with any other partner of yours in the lumber business?

- A. I was with my partner, Mr. Morgenthaler.
- Q. Were you there when he asked Mr. Morgenthaler to testify as a character witness for him?
- A. Yes, sir.
- Q. Do you recall what happened when he asked Mr. Morgenthaler to testify for him?
- A. Mr. Morgenthaler has a very bad heart condition and he thought it might upset him.
- Q. Do you recall that when he asked Mr. Morgenthaler to testify for him, that Mr. Morgenthaler said that, "If you will look me in the eye and tell me you were not a member of the Communist Party, I will come down there"?
- A. No, sir.
- Q. You were not present when that occurred?
- A. No, sir.

After government counsel had finished his cross-examination of Mr. Hitchcock, appellant's attorney asked that these questions "be stricken, and that the jury be instructed to disregard it, unless counsel is prepared to call Mr. Morgenthaler down here for purposes of impeachment" (Br. 32; Tr. 682). Government counsel assured the court that he had acted in good faith and that he would be willing to call Mr. Morgenthaler (Br. 32; Tr. 682). The court thereupon instructed the jury as follows (Br. 33; Tr. 683):

Members of the jury, with regard to the last witness, particularly the testimony with respect to the statement made by Mr. Morgenthaler, that

testimony may be stricken if Mr. Morgenthauer is not produced. Bear that in mind. That testimony should be — may be stricken, and if it is, you should give no consideration to it whatsoever.

After the jury had left the courtroom, appellant's attorney argued that government counsel's cross-examination was improper because no foundation had been laid and, even if a foundation had been laid, the matter was "immaterial, irrelevant and incompetent" (Br. 34; Tr. 693).

Counsel for defendant then, after time for reflection, merely renewed his motion to strike without requesting a mistrial. He urged additional grounds to support the motion to strike but made no contention that a fair trial was impossible before the jury which had heard the question propounded by government counsel. Nor did he object to the form of the court's admonition to the jury when it was instructed to disregard the question. The claim that the mere asking of the question was so prejudicial as to prevent a fair trial was made for the first time after the jury had returned a verdict of guilty. A defendant may not sit silently by and gamble on a favorable verdict. A motion for a new trial is not alternative relief for a criminal defendant who contends that he was entitled to a mistrial but elected to make no motion for that relief before the jury decided the issues of fact.

Gerard v. United States, 61 F. 2d 872, 875 (C.A. 7); *Jenkins v. United States*, 149 F. 2d 118, 119 (C.A. 5), certiorari denied 326 U.S. 721. In any event the decision of defendant's able trial counsel not to move for a mistrial is strong indication indeed that none was warranted. Both that attorney and the experienced trial judge heard what took place and apparently both believed that the granting of defendant's motion to strike and the giving of appropriate instructions to the jury was the proper procedure to be followed under the circumstances.

Government counsel assured the court that he would "make every effort to get Mr. Morgenthauer here" (Br. 34, 35; Tr. 693, 694). After further colloquy, the trial judge told government counsel (Br. 36; Tr. 696):

* * * I am inclined to think that there is some question about the admissibility or the propriety of the question on cross examination. I can see your theory. I am somewhat inclined to strike it.

Government counsel thereupon explained to the court, as follows, the grounds of his question (Br. 36; Tr. 696):

I might say in fairness to the Court I have never talked to Mr. Morgenthauer and I cannot assure the Court, when he gets here, what he will say as to the question asked of Mr. Hitchcock. I can only say from information that we have that that situation occurred.

The court, however, decided to strike the question and answer (Br. 37-38; Tr. 702), with the result that Mr. Morgenthaler was not called as a witness.

Appellant's attorney asked only that the discussion be stricken and he explicitly agreed to the form in which this was done (Br. 36-37; Tr. 696-697):

THE COURT: Of course, if the Court strikes the testimony on the theory last advanced, that it was improper cross examination, I think I would state that ground and no more.

MR. ETTER [appellant's attorney]: And the others will be disregarded. I think Your Honor should do it that way and say that the previous colloquy is disregarded.

THE COURT: Previous colloquy?

MR. ETTER: Should be disregarded.

THE COURT: Colloquy?

MR. ETTER: Yes, that is a fair way to state it.

THE COURT: Is that satisfactory?

MR. HELSELL [government counsel]: I think that is satisfactory, Your Honor. * * *

Accordingly, the court, in the following language, instructed the jury to disregard the question and answer (Br. 37-38; Tr. 702):

You will recall when Mr. Hitchcock was on the stand, the last witness, the question was asked on cross examination with respect to a statement allegedly made by Mr. Morgenthaler in the presence of Mr. Hitchcock. The Court has concluded

that that question was not a proper question on cross examination and, therefore, it should not have been asked and the question as well as the answer will be stricken and you will disregard it entirely.

In view of the Court's ruling there would be no occasion to — it would not be permissible to — call Mr. Morgenthauer even though he might be available. So, whether he is or not is not material in view of the Court's ruling. Therefore, you will disregard the answer and likewise the question with respect to that statement entirely and put it out of your mind and likewise you will disregard entirely the colloquy and the comments between Counsel as respecting that testimony as it occurred in the court room and erase it from your mind.

Counsel for appellant made no further objections to the stricken material, nor did he at any time move for a mistrial on the basis of the incident in question. Subsequently, during his instructions to the jury, the trial judge again cautioned them as follows (Tr. 775):

You must disregard any statement made by any person on either side of this case as to what any testimony has been unless borne out by your final recollection thereof.

You are likewise to disregard any evidence which may have been ordered stricken by the Court, and must also disregard any question or answer thereto, to which the Court has sustained an objection.

On April 5, 1957, following the return of the verdict, appellant filed an affidavit executed by Mr.

Morgenthauer, in which the affiant stated that he had at no time ever said to appellant, in words or in substance, that he would testify as a character witness for him if he would "look me in the eye and state you are not a Communist," (Br. 38-39). Mr. Morgenthauer further stated in his affidavit that, when appellant asked him to testify as a character witness, he told appellant that he would be "perfectly willing to testify" on his behalf, but that he could not do so because of his heart condition (Br. 39).

On April 11, 1957, Mr. Helsell, the government attorney who conducted the cross-examination in question, filed an affidavit stating that, prior to the second trial in this case, he had been advised by a special agent of the Federal Bureau of Investigation that the Bureau had information that, when appellant approached one of his employers prior to the first trial and asked him to appear as a character witness, the employer had declined to do so "under the circumstances and for the reasons described in affiant's question directed to the witness Hitchcock" (Br. 40). The attorney further stated in his affidavit that he had been further advised by the agent that this information had not been directly reported to the F.B.I. by the employer in question, but had come from other sources (Br. 40). Counsel explained, as follows, the

grounds on which he had based the question to Mr. Hitchcock which is here involved (Br. 40-41):

Accordingly, when it appeared from the cross-examination of the witness Hitchcock that his partner in the logging business, Mr. Morgenthauer, was present when Hitchcock was asked to appear as a character witness and when it further appeared that Mr. Morgenthauer was not going to appear himself as a character witness at the second trial and had not appeared during the first trial, affiant concluded that Mr. Morgenthauer was the partner in the H. M. and H. Logging partnership who had declined to testify in the circumstances and for the reasons set forth in affiant's question to Mr. Hitchcock. * * *

* * * * *

Affiant has been advised that Mr. Ray S. Hammer, Jr., now the sole remaining partner of Mr. Hitchcock in the H. M. and H. Logging business, has stated that he was approached by the defendant and asked to testify at the prior trial of this action as a character witness. Mr. Hammer declined to do so. He further states that in subsequently describing the incident to other people he may have stated that: "If Fisher had looked me in the eye and said he wasn't a Communist, I would have testified for him."

It was apparently the discussion by Mr. Hammer of the incident in the community which resulted in the information available to affiant at the time of trial. * * *

After thus setting forth the circumstances of his mistake, the attorney's affidavit concluded as follows (Br. 41-43, italics in the original):

* * * Although it now appears that affiant was

mistaken when concluding that Mr. Morgenthauer was the partner who had been approached in the fashion above described and who had declined to testify for the reasons set forth above, the mistake was the result of a spontaneous conclusion arrived at during the heat of a court trial. The question asked of Mr. Hitchcock was one which affiant then sincerely believed would affect Mr. Hitchcock's true opinion of the defendant's character for truth and veracity. Although hindsight indicates that Mr. Hitchcock should have been asked whether he had *heard* that one of his partners had declined to testify for the reasons stated, Hitchcock had testified that he was present when his partner was approached to testify and it was apparent that that other partner was not going to appear as a character witness. For that reason affiant chose to interrogate Mr. Hitchcock directly about the transaction and assumed that Mr. Hitchcock had been present when it occurred. That assumption now appears to be erroneous. Affiant now concedes the correctness of the Court's ruling that the question should not have been asked, and agrees that the jury was properly instructed to disregard it. However, affiant reiterates that the question propounded to Mr. Hitchcock was the result of an honest mistake, and was not asked as the result of any malicious or underhanded intent on affiant's part to prejudice the defendant or to prevent him from having a fair trial.

From the foregoing necessarily extended recital, it is possible to sum up the pertinent facts as follows: Government counsel was in possession of information, according to which, as he understood it, an employer of appellant — a partner of witness Hitchcock — had, when asked by appellant to be a character witness

on his behalf, told appellant that he would do so if he would "look [him] in the eye" and tell him that he was "not a member of the Communist Party." Counsel, understandably, but mistakenly, assumed (from the facts (1) that Hitchcock testified on cross-examination that he was present when appellant made such a request to Hitchcock's partner, Mr. Morgenthauer, and (2) that Morgenthauer had not appeared, and was not going to appear, as a witness) that the partner who had made this statement was Morgenthauer. Accordingly, for the purpose of seeking to impeach witness Hitchcock as a character witness, counsel asked Hitchcock if he was present when Morgenthauer made the statement in question. The true fact (which counsel did not learn till after the trial) was that a *third* partner, Mr. Hammer (according to information in the possession of the F.B.I.), having been asked by appellant to testify on his behalf as a character witness and having declined to do so, "may have" told other persons, in subsequently describing the incident, that he would have consented to testify on appellant's behalf if appellant had "looked me in the eye and said he wasn't a Communist." The court, very shortly after the asking and answering of the pertinent question during Hitchcock's cross-examination, struck the question and answer and instructed

the jury to disregard the matter entirely. This action of the court was taken, not because of the error of government counsel as to who made the statement in question and the attendant circumstances (which error was not discovered till later), but because, in the court's view, the question had not been properly framed (apparently — though the record is not entirely clear on the point — because it was cast in the form of an assumption of fact that the incident in question had occurred, as distinguished from a query as to whether Hitchcock had ever “heard” that such an incident occurred).

These being the relevant facts, it is submitted that there is no basis for the contention that appellant was the victim of reversible error.

1. First, the jury was instructed, as effectively as in the nature of things was possible, that the “question was not a proper question,” that it “should not have been asked,” and that, accordingly, both the question and the answer were “stricken” and the jury was to “disregard it entirely” and “Put it out of your mind” (Br. 37, 38).

As was observed by the Supreme Court in *Opper v. United States*, 348 U.S. 84, 95, “Our theory of trial relies upon the ability of a jury to follow instruc-

tions." See also, to the same effect, *Marron v. United States*, 18 F. 2d 218, 219 (C.A. 9), affirmed, 275 U.S. 192; *Nye & Nissen v. United States*, 168 F. 2d 846, 855 (C.A. 9), affirmed, 336 U.S. 613. Prejudice is particularly unlikely where the court's instructions are given (as they were here) promptly and clearly (*Remus v. United States*, 291 Fed. 501, 510 (C.A. 6), certiorari denied, 263 U.S. 717); where (as is certainly true in this case) there is ample admissible evidence to support the verdict (*Marron v. United States*, *supra*; *Metzler v. United States*, 64 F. 2d 203 (C.A. 9)); and where (as here) the witness answered the stricken question in the negative. *Jung Quey v. United States*, 222 Fed. 766 (C.A. 9); *Clark v. United States*, 23 F. 2d 756 (C.A. D.C.). Similarly, where government counsel, in arguing to the jury, makes an improper statement which is not substantiated by the evidence, the ordinary rule is that the error is cured by withdrawing the statement, particularly where, as here, there is strong evidence to support the Government's case. *Sawyer v. United States*, 202 U.S. 150, 167-168; *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 238-240, 242-243. The courts are particularly reluctant to order a new trial for a single misstatement made in the course of a long trial (*Nye & Nissen v. United States*, *supra*, 168 F. 2d 846

(C.A. 9), affirmed, 336 U.S. 613), especially if made in the excitement of the trial (see *Sawyer v. United States*, *supra*, 202 U.S. at 168) and in good faith (*Lewis v. United States*, 74 F. 2d 173, 179 (C.A. 9); *Clark v. United States*, *supra*, 23 F. 2d 756 (C.A. D.C.)). Since it is clear from the record, as summarized above, that the government attorney's error in framing his question was made in good faith, as the result of an easily understandable confusion of identities and attendant circumstances, and since the evidence of appellant's guilt can be said, without exaggeration, to have been truly overwhelming (see *supra*, pp. 3-22), there is, we submit, clearly no basis for the contention that reversible error resulted from the incident in question.

2. Furthermore, on the basis of the information which government counsel possessed, it would, we think, have been proper to ask witness Hitchcock, for the purpose of attempting to impeach him as a character witness, whether he had ever *heard it said in the community* that one of his partners, a co-employer of appellant, after having refused appellant's request that he testify on his behalf as a character witness, had told others that he would have agreed to testify for appellant if the latter had "looked me in the eye and said he wasn't a Com-

munist”¹⁵. For, a character witness does not testify as to the defendant’s character on the basis of his own knowledge, but rather on the basis of statements he has heard made by others in the community. *Michelson v. United States*, 335 U.S. 469, 479; *Sloan v. United States*, 31 F. 2d 902, 906 (C.A. 8). Therefore, in cross-examining a character witness, counsel can properly question the witness as to whether he has heard of certain facts, such as arrests and convictions for other offenses, damaging to the reputation of the defendant in order to impeach either the veracity or reliability of the testimony of the witness that the defendant has a reputation for truth and veracity. *Michelson v. United States*, *supra*, 335 U.S. at 479; *Mitrovich v. United States*, 15 F. 2d 163 (C.A. 9).

¹⁵ Although most state courts hold that the impeaching admission on the part of the character witness must relate to something which he has heard (damaging to the accused’s reputation) prior to the commission of the offense for which the accused is on trial (see 47 A.L.R. 2d 1302), the only federal case in point states that a character witness may be questioned as to events either before or after the alleged commission of the crime, so long as they are not too remote. *Sloan v. United States*, 31 F. 2d 902, 906 (C.A. 8). Since, in the present case the affidavits were filed in 1951 and 1952, and the prosecutor’s question related to an incident reported to have occurred in 1954, the question would not, we believe, have been improper as relating to an event occurring too remote in time from the offenses charged.

Assuming that Mr. Hammer in fact made such a remark to other persons as he says he "may have" made (according to the F.B.I.'s information), government counsel could have properly questioned Hitchcock as to whether he had ever heard it said in the community that one of his partners had made such a statement. For, if Hitchcock had heard that such a statement had been made, an admission on his part that he had heard of it would obviously have seriously impeached his testimony that appellant had a good reputation for truth and veracity.¹⁶

It would, in other words, have been proper for the government attorney to incorporate into a *properly-framed question* much of the essential contents of the question which he did in fact ask (and which was

¹⁶ The impeaching question must be phrased in such a manner as not to assume the truth of the alleged facts damaging to the defendant's reputation. *Michelson v. United States*, *supra*, 335 U.S. at 482; *Little v. United States*, 93 F. 2d 401, 408 (C.A. 8), certiorari denied, 303 U.S. 644. In other words, such questions must be phrased "Have you heard?" rather than "Do you know?" *Michelson v. United States*, *supra*, 335 U.S. at 482; *Kasper v. United States*, 225 F. 2d 275, 279 (C.A. 9). Here, the question asked ("Do you recall * * *?") assumed the fact of the event asked about. Consequently, apart from the mistake of government counsel as to which partner made the statement in question and the circumstances surrounding it, the court was concededly correct in striking the question and answer.

later stricken). This fact serves further to delimit the area of any possible prejudice.

3. Finally, it is to be recalled that counsel for appellant explicitly agreed to the form in which the trial judge directed the question and answer to be stricken (*supra*, pp. 31-32) and made no further objection or motion for a mistrial. This Court has held that where a defendant objects to the cross-examination of a character witness on one ground and the objection is overruled, any objection to the question on other grounds is waived. *Kasper v. United States*, 225 F. 2d 275 (C.A. 9). For the same reason, where a defendant's objection is, as here, *sustained*, and he accepts the court's order striking the question and answer, possible objections to the question based on other grounds should likewise be deemed waived. The Court of Appeals for the Eighth Circuit has, in fact, so held. *Roberts v. United States*, 96 F. 2d 39 (C.A. 8); cf. *Cossack v. United States*, 82 F. 2d 214, 216 (C.A. 9), certiorari denied, 298 U.S. 654, 678.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

CHARLES P. MORIARTY,
United States Attorney
Western District of Washington

PHILIP R. MONAHAN
BRUCE J. TERRIS
Attorneys, Department of Justice,
Attorneys for Appellee

JANUARY, 1958.

No. 15586 ✓

United States
Court of Appeals
for the Ninth Circuit

ELIZABETH G. WILLIAMS, Executrix, Estate
of Preston L. Lykins, Deceased,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

FILED

AUG 23 1957

PAUL P. ORDEN, CLERK



No. 15586

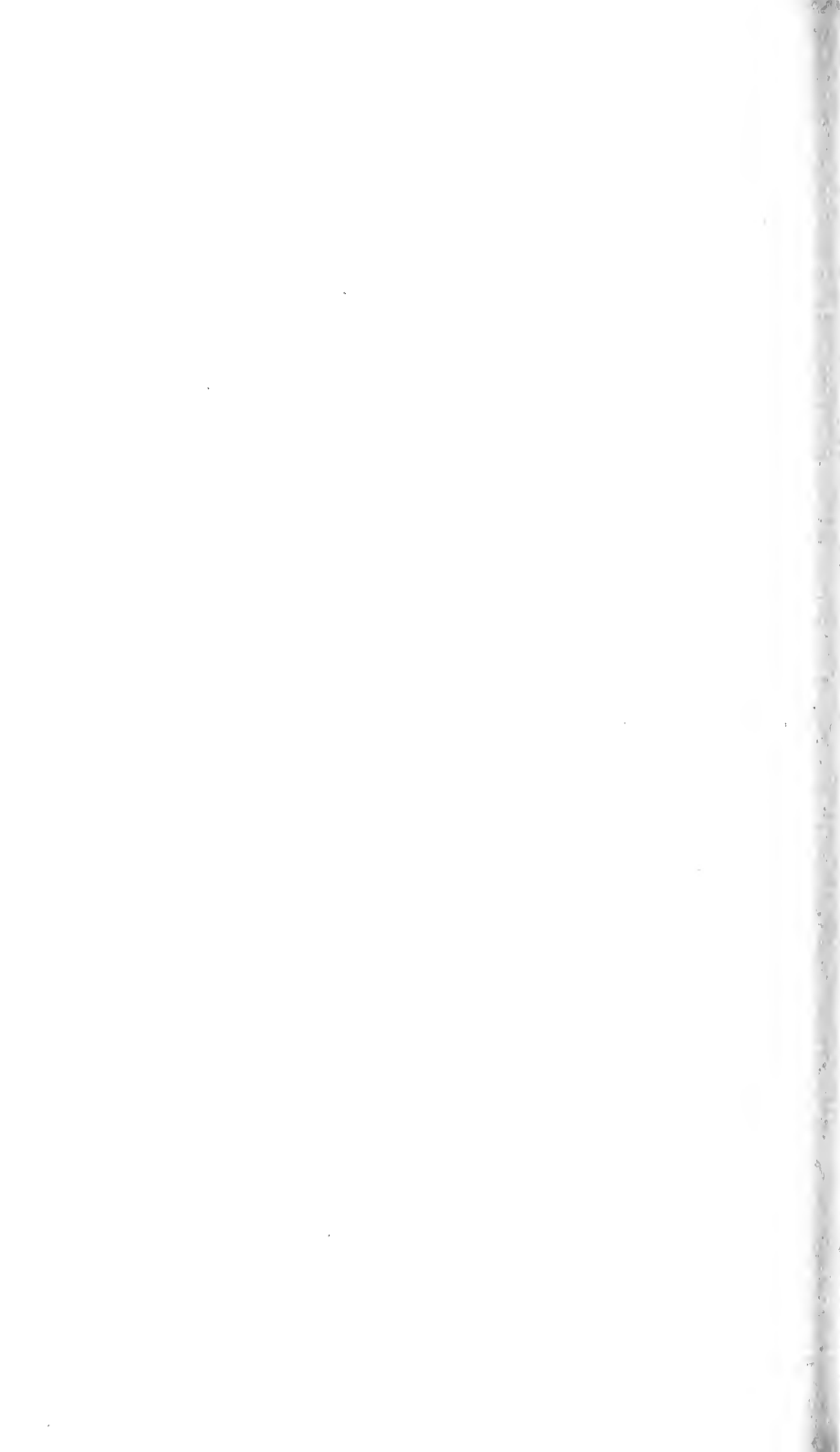
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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14 Montgomery Street,
San Francisco, California,

For Appellant.

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Assistant Attorney General,
Department of Justice,
Washington 25, D. C.,

LLOYD H. BURKE,

United States Attorney,

LYNN J. GILLARD,

Assistant United States Attorney,

MARVIN M. MORGANSTEIN,

Assistant United States Attorney,
Post Office Building,
San Francisco, California,

For Appellee.



In the District Court of the United States, Northern District of California, Southern Division

Civil Action No. 35699

ELIZABETH G. WILLIAMS, EXECUTRIX,
ESTATE OF PRESTON L. LYKINS, DECEASED,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

COMPLAINT FOR REFUND OF TAXES PAID

Plaintiff claims of defendant, United States of America, the sum of Ten Thousand Four Hundred Seventy-two Dollars and Ninety-nine Cents (\$10,472.99), representing income tax and interest erroneously and illegally assessed and collected from plaintiff without authority, together with interest thereon as provided by law, and complains and alleges as follows:

I.

Jurisdiction of this action is conferred by §1346 (a)(1) of Title 28 of the United States Code.

II.

Plaintiff now is, and at all times mentioned herein was, a resident of the First District of California.

III.

This action is one to recover a fiduciary income tax erroneously and illegally assessed and collected

without authority under the Internal Revenue Laws of the United States pursuant to authority conferred to sue by §1346(a)(1) of Title 28 of the United States Code.

IV.

On or about the 13th day of June, 1952, plaintiff filed a United States Fiduciary Income Tax Return with the District Director of Internal Revenue (formerly the Collector of Internal Revenue), First District of California, San Francisco, California, for the period beginning with the date of decedent's death on January 8, 1951, and ending December 31, 1951. Plaintiff kept books and records and the cash method of accounting and prepared said income tax return pursuant to that method; said income tax return showed a tax due in the sum of Fifteen Thousand One Hundred Forty-nine Dollars and Seventy Cents (\$15,149.70), which tax was paid by plaintiff to the District Director of Internal Revenue, First District of California, San Francisco, California. The sum of Three Thousand Three Hundred Seven Dollars (\$3,307.00) was paid on March 4, 1952, from the balance of Eleven Thousand Eight Hundred Forty-two Dollars and Seventy Cents (\$11,842.70), plus Seven Dollars and Twenty-one Cents (\$7.21) interest was paid on June 13, 1952.

V.

Subsequent to the filing of said return plaintiff was assessed additional tax for said period in the sum of One Thousand Two Hundred Forty-eight Dollars and Twenty-four Cents (\$1,248.24) and said

deficiency was paid to the District Director of Internal Revenue, First District of California, San Francisco, California, on or about November 25, 1955.

VI.

In said federal income tax return of plaintiff for the period beginning January 8, 1951, and ending December 31, 1951, plaintiff erroneously included and reported as part of plaintiff's gross income for said period the taxpayer's income for the period September 18, 1951, to December 31, 1951, which was permanently set aside for charitable and religious purposes and was exempt from income tax, on which income plaintiff erroneously paid income taxes in the sum of Seven Thousand Nineteen Dollars and Thirty-nine Cents (\$7,019.39) as a part of the Sixteen Thousand Three Hundred Ninety-seven Dollars and Ninety-four Cents (\$16,397.94) which were paid by plaintiff as set forth above in paragraphs IV and V. The income so erroneously included by plaintiff in said return constituted plaintiff's income for the period beginning September 18, 1951, and ending December 31, 1951, which plaintiff claims was permanently set aside for charitable and religious purposes and was exempt from income tax.

VII.

On or about May 12, 1953, plaintiff filed with the District Director of Internal Revenue, First District of California, San Francisco, California, a claim for refund on Treasury Form 843, a copy of which is attached hereto, marked Exhibit "A", and by reference made a part hereof.

VIII.

On or about January 24, 1955, plaintiff received from the District Director of Internal Revenue, San Francisco, California, a Revenue Agent's report stating that said claim had been reviewed and that it was recommended that said claim be rejected.

IX.

On or about December 28, 1955, plaintiff received a letter from the United States Treasury Department, Internal Revenue Service, Regional Commissioner, Appellate Division-San Francisco Region, San Francisco, California, a copy of which is attached hereto, marked Exhibit "B", and by reference made a part hereof, advising that plaintiff's claim for refund for the period beginning January 8, 1951, and ending December 31, 1951, in the amount of Seven Thousand Nineteen Dollars and Thirty-nine Cents (\$7,019.39) was disallowed.

Wherefore, plaintiff prays for judgment in the sum of Seven Thousand Nineteen Dollars and Thirty-nine Cents (\$7,019.39) with interest thereon from dates of payment as provided by law, for plaintiff's costs of suit herein incurred, and for such other and further relief as to this Court may deem meet in the premises.

MARTIN MINNEY, JR.,
ROBERT C. HARRIS,
HELLER, EHRMAN, WHITE &
McAULIFFE,

/s/ By ROBERT C. HARRIS,
Attorneys for Plaintiff.

Duly Verified.

EXHIBIT "A"

Claim

to be filed with the collector where assessment was made or tax paid.

The Collector will indicate in the block below the kind of claim filed, and fill in, where required, the certificate on the back of this form.

[X] Refund of taxes illegally, erroneously, or excessively collected.

Name of taxpayer or purchaser of stamps: Estate of Preston L. Lykins, Deceased.

Street address: C/o Heller, Ehrman, White & McAuliffe, 14 Montgomery Street.

City, postal zone number, and State: San Francisco 4, California.

1. District in which return (if any) was filed: 1st California District.

2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from 1/8, 1951, to 12/31, 1951.

3. Kind of tax: Income tax.

4. Amount of assessment, \$15,149.70; dates of payment, 3/4/52—\$3,307.00; 6/13/52—\$11,849.91.

6. Amount to be refunded, \$7,019.39.

I declare under the penalties of perjury that this claim (including any accompanying schedules and

Exhibit "A"—(Continued)

statements) has been examined by me and to the best of my knowledge and belief is true and correct.

Signed.....

Executrix of the Estate of Preston
L. Lykins.

Dated....., 19....

Estate of Preston L. Lykins
Claim for Refund

Preston L. Lykins died January 8, 1951 and under his will, a copy of which is attached hereto, he left his entire estate to his surviving wife, Mary T. Lykins, who died September 18, 1951. Under the will of Mary T. Lykins, a copy of which is attached hereto, the residue of her estate was left in trust to pay the income for religious and charitable uses and purposes to certain stated religious and charitable organizations during the life of the individual trustee, and upon the latter's death, the corpus vests in said organizations for said purposes. Although there are specific bequests and devises provided for under the will of Mary T. Lykins, it is specifically provided that no interest or income shall be payable on any legacies and all income received during administration shall be used for expenses of administration, or to the extent not necessary for that purpose, shall become part of the residue of the estate. Therefore, the entire income of the Estate of Preston L. Lykins, from the date of his wife's death (9/18/51), is permanently set aside for

the benefit of charitable and educational purposes and is exempt from income taxation.

The original return and computation of changes therein is as follows:

	Original Return	As Corrected
Net income:	\$33,257.04	\$33,257.04
Income from 9/18/51 to 12/31/51 permanently set aside for charitable purposes:	<u>—0—</u>	<u>9,687.56</u>
Net income taxable to fiduciary	\$33,257.04	\$23,569.48
Less: Exemption	<u>600.00</u>	<u>600.00</u>
Balance	\$32,657.04	\$22,969.48
Tax	\$15,149.70	\$ 8,130.31
Overpayment:		
Total tax due per original return.....		\$15,149.70
Payments:		
Tentative tax paid 3/4/52 \$ 3,307.00		
Balance with interest paid 6/13/52	11,849.91	
Total paid	<u>\$15,156.91</u>	
Total tax as corrected.....		<u>\$ 8,130.31</u>
Overpayment		\$ 7,019.39

EXHIBIT "B"

U. S. Treasury Department
Internal Revenue Service
Regional Commissioner
San Francisco, Calif.
Appellate Division—San Francisco Region
Room 1010 — 870 Market Street
San Francisco 2, California

In Reply Refer to
Ap:SF:AA:WBH

Mrs. Elizabeth G. Williams, Executrix of the
Estate of Preston L. Lykins, Deceased, Transferor
c/o Heller, Ehrman, White and McAuliffe
14 Montgomery Street
San Francisco, California

Dear Mrs. Williams:

Your proposal for settlement incorporated in a notice waiving, under the Internal Revenue Code, any restrictions on the assessment and collection of deficiencies in the income tax liabilities of the Estate of Preston L. Lykins, Deceased, for the taxable years ended December 31, 1951 and December 31, 1952, has been accepted.

The taxes as determined in the Revenue Agent's report dated January 24, 1955 discloses a total deficiency of \$10,302.88 in the income tax liability of the above-named Estate for the taxable years mentioned.

In view of the foregoing basis of settlement, the Estate's claim for refund for the year 1951 in the amount of \$7,019.39 will be disallowed. Official no-

Exhibit "B"—(Continued)

tice of the disallowance will be issued in accordance with the provisions of law applicable to the disallowance of claims.

A copy of this letter has been mailed to your representative, Mr. Charles A. Wood, Jr., c/o Heller, Ehrman, White and McAuliffe, 14 Montgomery Street, San Francisco, California, in accordance with the authority contained in the power of attorney executed by you.

Very truly yours,

/s/ H. M. SORRELL

H. M. Sorrell

Acting Assistant Chief Appellate.

[Endorsed]: Filed July 23, 1956.

[Title of District Court and Cause.]

ANSWER

The defendant, United States of America, by its attorney, Lloyd H. Burke, United States Attorney for the Northern District of California, for answer to the complaint of the plaintiff admits, alleges and denies:

Defendant denies the allegations contained in the preliminary and unnumbered paragraph of the complaint.

1.

Defendant admits the allegations contained in paragraph numbered I of the complaint.

2.

Defendant admits the allegations contained in paragraph numbered II of the complaint.

3.

Defendant admits the allegations contained in paragraph numbered III of the complaint, except that defendant specifically denies that any fiduciary income tax was erroneously and illegally assessed and collected from plaintiff without authority under the Internal Revenue laws of the United States.

4.

Defendant admits the allegations contained in paragraph numbered IV of the complaint.

5.

Defendant admits the allegations contained in paragraph numbered V of the complaint.

6.

Defendant denies the allegations contained in paragraph numbered VI of the complaint.

7.

Defendant admits that plaintiff filed a claim for refund and that Exhibit "A" attached to the complaint is a copy of said claim. Except as specifically admitted in this answer, defendant denies each and every allegation and statement in said claim for refund.

8.

Defendant admits the allegations contained in paragraph numbered VIII of the complaint.

9.

Defendant admits the allegations contained in paragraph numbered IX of the complaint.

Wherefore, defendant prays that this action be dismissed, with costs to the defendant.

LLOYD H. BURKE,
United States Attorney,

/s/ By MARVIN D. MORGENSTEIN,
Assistant United States Attorney.

Certificate of Mailing Attached.

[Endorsed]: Filed Sept. 24, 1956.

[Title of District Court and Cause.]

STIPULATION OF FACTS

It Is Hereby Stipulated by and between the parties hereto that the following allegations of fact are admitted by the pleadings and shall be taken to be true in the above entitled proceeding and received as evidence therein, subject to the right of either party, or both parties, to offer such further evidence as may be relevant, competent or material and not contrary to the facts herein stipulated, and subject to the right of either party to object at the hearing to any of the facts herein on the grounds of irrelevancy and immateriality:

1. Plaintiff is the duly appointed executrix of the last will and testament of Preston L. Lykins, deceased, and Letters Testamentary were issued to said executrix on the 20th day of February, 1951. The address of plaintiff is care of Heller, Ehrman, White & McAuliffe, 14 Montgomery Street, San Francisco, California. Plaintiff duly filed a United States Fiduciary Income Tax Return for the period commencing with the death of Preston L. Lykins, on January 8, 1951 and ending December 31, 1951; said return disclosed total income for said period in the sum of \$33,257.04, with a tax liability in the sum of \$15,149.70. Said return was audited by agents of the Bureau of Internal Revenue (now the Internal Revenue Service) and the net income subject to tax was determined to be the sum of \$35,162.76. Plaintiff kept books and records on the cash method of accounting and prepared said income tax return on a cash basis. Plaintiff paid the income tax liability disclosed by said return and the deficiency in tax determined by said audit, together with interest thereon, in the following amounts and on the following dates:

The sum of \$3,307.00 was paid on March 4, 1952; \$11,842.70, plus \$7.21 interest, was paid on June 13, 1952; and the deficiency in tax for said period in the sum of \$1,248.24, plus interest in the sum of \$270.42, was paid on or about November 25, 1955.

2. On or about May 12, 1953, plaintiff filed a claim for refund of income taxes for the period in controversy herein and said claim is marked Ex-

hibit "A" and is attached to plaintiff's complaint herein. On or about January 24, 1955, plaintiff received from the District Director of Internal Revenue, San Francisco, California, a Revenue Agent's Report stating that said claim had been reviewed and that it was recommended that said claim be rejected. On or about December 28, 1955, plaintiff received a letter from the United States Treasury Department, Internal Revenue Service, Regional Commissioner, Appellate Division-San Francisco Region, San Francisco, California, a copy of which is attached to plaintiff's complaint and is marked Exhibit "B," advising that plaintiff's claim for refund, in the amount \$7,019.39, for said period in controversy was disallowed.

It Is Further Stipulated by and between the parties hereto that the following facts shall be taken to be true in the above entitled proceedings and received as evidence therein, subject to the right of either party, or both parties to offer such further evidence as may be relevant, competent or material and not contrary to the facts herein stipulated, and subject to the right of either party to object at the hearing to any of the facts herein on the grounds of irrelevancy and immateriality:

1. The amount of plaintiff's claim for refund was computed by plaintiff on the basis of the ratio that the number of days commencing with the date of death of the decedent's surviving spouse (September 18, 1951) and ending December 31, 1951, bears to the total number of days in the taxable

period of said return. If it is determined by the Court that plaintiff is entitled to a refund as claimed by plaintiff, then the amount of the refund may be computed and agreed upon by the parties and in the absence of an agreement between the parties, the matter of the amount of the refund may be reopened in this proceeding by either party hereto.

2. Preston L. Lykins, the decedent herein, died on January 8, 1951, leaving a will which was admitted to probate in the Superior Court in and for the City and County of San Francisco, a copy of which is attached hereto and marked Exhibit "1."

3. The decedent was survived by his spouse, Mary T. Lykins, who died on September 18, 1951, leaving a will which was admitted to probate in the Superior Court in and for the City and County of San Francisco, a copy of which is attached hereto and marked Exhibit "2."

4. Copies of plaintiff's First and Final Account as executrix of the last will and testament of Preston L. Lykins, deceased, and the Decree of Settlement of First and Final Account and of Final Distribution are attached hereto and are marked Exhibits "3" and "4," respectively.

5. Copies of plaintiff's First and Final Account as executrix of the last will and testament of Mary T. Lykins, deceased, and the Decree of Settlement of First and Final Account and of Final Distribution are attached hereto and are marked Exhibits "5" and "6," respectively.

6. Plaintiff duly filed a United States Fiduciary Income Tax Return for the period commencing with the death of Mary T. Lykins, on September 18, 1951, and ending December 31, 1951. Said return was audited by agents of the Bureau of Internal Revenue (now Internal Revenue Service) and the Revenue Agent's Report of said audit is attached hereto and is marked Exhibit "7."

7. The Internal Revenue Service determined, pursuant to said Revenue Agent's audit of the fiduciary income tax returns for the Estate of Mary T. Lykins, deceased, that the trust and the beneficiaries thereof set forth in the last will and testament of Mary T. Lykins is a trust for charitable, educational and religious purposes within the meaning of section 23(o) of the 1939 Internal Revenue Code (now section 170(c) of the 1954 Internal Revenue Code.

/s/ MARTIN MINNEY, JR.,

/s/ ROBERT C. HARRIS,

Counsel for Plaintiff.

HELLER, EHRMAN, WHITE &
McAULIFFE,

LLOYD H. BURKE,

United States Attorney,

/s/ By LYNN J. GILLARD,

Assistant United States Attorney,

Counsel for Defendant.

EXHIBIT "1"

120126

WILL

I, Preston L. Lykins, of San Francisco, California, over the age of twenty-one (21) years, being of sound and disposing mind and memory and not acting under duress, menace, fraud or undue influence of any person whomsoever, do make, publish and declare this my last will and testament in the manner following:

Article I.

I do hereby revoke any and all wills and codicils to wills previously made by me.

Article II.

I hereby declare that I am married and that my wife's name is Mary T. Lykins. I have no children and there are no children of mine now deceased leaving issue now surviving.

Article III.

With the exception of my personal effects which constitute my separate property, all other property belonging to me, or in which I have any interest, constitutes the community property of my said wife, Mary T. Lykins, and me.

Article IV.

I hereby appoint my said wife, Mary T. Lykins, and my wife's niece, Elizabeth G. Williams, of Berkeley, California, a co-executrices of this Will, and I direct that they shall serve in that capacity without bonds. Should either my said wife or the

Exhibit "1"—(Continued)

said Elizabeth G. Williams predecease me, or, if for any reason, either of them shall be unable or unwilling to act as an executrix of this will, then I direct that the other of them shall act as sole executrix of this will, she to serve without bond. Should my said wife and the said Elizabeth G. Williams both predecease me, or should both of them, for any reason, be unable or unwilling to act as an executrix of this will, then I appoint Wells Fargo Bank & Union Trust Co., Market and Montgomery Streets, San Francisco, California, to act as sole executor of this will.

My said executors, in addition to the powers of executors under the law, shall have full power to sell, exchange, lease, mortgage, or pledge any property of my estate, whether real or personal (excluding, however, all items of real and personal property specifically bequeathed under the provisions of this will) and to invest and reinvest monies coming into their hands, all without previous order of court and with or without notice, and upon such terms and conditions as they may deem best, but subject, however, to confirmation by court, as provided by law.

Article V.

I give, devise and bequeath all of my property and estate, both real and personal, and wherever situated, to my said wife, Mary T. Lykins, if she shall survive me.

Article VI.

If my said wife shall predecease me, then I

Exhibit "1"—(Continued)

direct that my said executors shall pay all State Inheritance and Federal Estate taxes due from my estate or from any person interested therein, it being my express wish and intention that each of the hereinafter named legatees, devisees and beneficiaries under this will shall not be charged with, or required to pay, or to contribute toward the payment of, any portion of such taxes, but that their respective shares of my estate, as hereinafter provided, shall go to and vest in them free of any such taxes. In the eventuality contemplated by this Article VI, i.e., that my said wife shall not survive me, then all such State Inheritance and Federal Estate taxes shall be a charge against, and shall be paid from, the residue of my estate.

Article VII.

For the purpose of identification, the Eula G. Elliott, who is mentioned in this Article VII, is a niece of my said wife, Mary T. Lykins; the Elizabeth Elliott, who is mentioned in this Article VII, is a grand-niece of my said wife, and the Roy H. Elliott, Jr., who is mentioned in this Article VII is a grand-nephew of my said wife. If my said wife shall predecease me, then my property and estate is hereby disposed of as follows:

(a) I give and bequeath all of my personal effects, all personal effects and jewelry which belonged to my said wife and which I may have inherited from her, and the entire contents of my home in San Francisco, California, including, but

Exhibit "1"—(Continued)

not restricted to, all furniture, furnishings, dishes, silverware, bric-a-brac, linens and objects of art, situated therein at the time of my death, to the said Elizabeth G. Williams and the said Eula G. Elliott, also of Berkeley, California, share and share alike, or to the survivor of them, should one of them predecease me.

(b) I give, devise and bequeath the real property, together with all improvements thereon, situated at 13th and K Streets, Sacramento, California, and commonly known as "No. 1300 K Street," now belonging to, and standing of record in the names of, my said wife and me (provided the said property is owned by me at the time of my death) to the said Elizabeth Elliott of Berkeley, California. Should the said Elizabeth Elliott predecease me, then the property mentioned in this subdivision (b) of this Article VII shall go to and vest equally in her living issue by right of representation; or, failing such issue then surviving, in said Roy H. Elliott, Jr., if he be living, and if not living, then said property shall constitute and be a part of the residue of my estate and shall be disposed of in like manner therewith.

(c) I give, devise and bequeath the Lykins Ranch in Sacramento County, California, consisting of one hundred twenty-seven (127) acres of land, more or less, now owned and standing of record in the names of my wife and me, together with all improvements, farm equipment, livestock, buildings

Exhibit "1"—(Continued)

and the entire contents of all such buildings, including household furniture and furnishings (provided the said ranch property is owned by me at the time of my death) to the said Roy H. Elliott, Jr.; provided, however, that should the said Roy H. Elliott, Jr., predecease me, then the property described in this subdivision (c) of this Article VII shall go to and vest equally in his living issue by right of representation; or, failing such issue then surviving, in the said Elizabeth Elliott if she be living, and if not living, then said ranch property shall constitute and be a part of the residue of my estate and shall be disposed of in like manner therewith.

(d) I give and bequeath the sum of Five Thousand Dollars (\$5,000.00) to my said wife's nephew, Stewart Snider, of Monterey, California, if he be living; and, if not living, then to his living issue by right of representation.

(e) I give and bequeath the sum of Three Thousand Dollars (\$3,000.00) to my said wife's nephew, Earl Snider, of Denair, California, if he be living; and, if not living, then to his living issue by right of representation.

(f) I give and bequeath the sum of Five Thousand Dollars (\$5,000.00) to the Shriners' Hospital For Crippled Children, a corporation, to be used exclusively for the benefit of the hospital located in the City and County of San Francisco, State of California, owned, operated and maintained by said corporation.

Exhibit "1"—(Continued)

(g) I give and bequeath the sum of Five Thousand Dollars (\$5,000.00) to Washington Lodge No. 20 F. & A.M. of Sacramento, California; such bequest to be used for the perpetual care of that certain cemetery plot standing of record in the names of P. L. Lykins and N. G. Curtis, and situated in the cemetery maintained by the City of Sacramento, California.

(h) I give and bequeath the sum of Two Thousand Five Hundred Dollars (\$2,500.00) to The Masonic Homes of California, a corporation, to be used exclusively for the benefit of the Home for the Aged owned, operated and maintained by said corporation at Decoto, California.

(i) I give and bequeath the sum of Two Thousand Five Hundred Dollars (\$2,500.00) to The Masonic Homes of California, a corporation, to be used exclusively for the benefit of the Home for Children owned, operated and maintained by said corporation, at Covina, California.

(j) I give and bequeath the sum of Ten Thousand Dollars (\$10,000.00) to Robert K. Pattridge in appreciation of his many years of service to me, provided he is in my employ at the time of my death. Should the said Robert K. Pattridge not be in my employ at the time of my death, then this bequest shall lapse.

(k) I give and bequeath the sum of Ten Thousand Dollars (\$10,000.00) to my good friend, Dr. John Philip Strickler, of San Francisco, California,

Exhibit "1"—(Continued)

as a token of my gratitude and friendship, and in appreciation of his many kindnesses toward me.

(1) After carrying out all of the foregoing provisions of this Article VII, after payment by my said executors of all State Inheritance and Federal Estate taxes due from my estate or from any person interested therein, as directed in Article VI of this will, and after payment by my said executors of all debts and claims and expenses of administration, I give, devise and bequeath all of the rest, residue and remainder of my property and estate, both real and personal, and wherever the same may be situated, to the said Elizabeth G. Williams, in trust, nevertheless, to hold, manage and distribute in accordance with the uses and purposes mentioned in Article VIII of this will and under the terms and conditions mentioned in Article IX hereof. Said trustee shall act without bond.

Article VIII.

(a) It is my desire and purpose, in the event that my said wife, Mary T. Lykins, shall predecease me, to devote a substantial part of my estate to religious and charitable uses and purposes, and to make such provision therefor in this will. The said Elizabeth G. Williams, the trustee mentioned in subdivision (1) of Article VII of this will, is fully aware of this desire and purpose and she shall accordingly invest and reinvest the trust property to be distributed to her hereunder, collect the income therefrom, pay all expenses incidental to the

Exhibit "1"—(Continued)

administration of the trust, and then apply the net income therefrom as follows:

All of the annual net income from the trust property shall be used by my said Trustee exclusively for religious, charitable and educational purposes. In this connection I direct that such annual income shall be divided and distributed by said Trustee at such times, in such manner, and in such proportions as she in her sole and exclusive discretion shall determine (subject only to the direction that the entire annual net income shall be distributed, and that no part thereof shall be accumulated) among any or all of the following named corporations or institutions:

John Milton Society For The Blind, 156 Fifth Avenue, New York, New York.

Hebrew Evangelization Society, Inc., 2209 Michigan Avenue, Los Angeles, California.

The Fuller Foundation, Pasadena, California. All payments made to this institution are to be used in furthering the religious broadcasting activities of Dr. Charles E. Fuller, during his lifetime, and thereafter to such use as the Board of Directors of the Fuller Foundation shall direct in furthering the objectives of that institution.

American Bible Society, 450 Park Avenue, New York 22, New York.

Gramercy Boys' Club, 380 East 143rd Street, New York, New York.

Exhibit "1"—(Continued)

(b) Upon the death of my said Trustee, Elizabeth G. Williams, the trust shall cease and terminate and the entire principal or corpus of the trust estate together with any accrued or accumulated income thereon shall thereupon vest in and be distributed to the following named beneficiaries in the following proportions:

Twenty per cent (20%) thereof to said above mentioned John Milton Society For The Blind.

Twenty per cent (20%) thereof to said above mentioned Hebrew Evangelization Society, Inc.

Twenty per cent (20%) thereof to said above mentioned The Fuller Foundation. The share of the trust estate so distributed to this beneficiary shall be used in furthering the religious broadcasting activities of Dr. Charles E. Fuller, during his lifetime, and shall, thereafter to the extent that such share remains unexpended, be used in **furthering** the objectives of that institution as may be determined in the discretion of its Board of Directors.

Twenty per cent (20%) thereof to said above mentioned American Bible Society.

Twenty per cent (20%) thereof to said above mentioned Gramercy Boys' Club.

(c) In the event that any of the charitable corporations or institutions hereinabove named in this Article VIII shall not be in existence at the date of the death of my said Trustee, Elizabeth G. Wil-

Exhibit "1"—(Continued)

liams, and the consequent termination of the trust, or in the event that any of said charitable corporations or institutions cannot for any reason take and receive the portions of the trust estate hereinabove given to such charitable corporation or institution upon the termination of the trust, then in either of such events, the portion of the trust estate so given to such charitable corporation or institution shall be divided between, and shall vest equally in, the other charitable corporations or institutions hereinabove named which are then in existence and can take and receive the trust property going to them under the terms of this will.

(d) Said Wells Fargo Bank & Union Trust Co. is hereby appointed as successor Trustee to Elizabeth G. Williams and shall, upon the death of said Elizabeth G. Williams and the consequent termination of the trust hereby created, succeed her for the sole purpose of winding-up the administration of the trust estate as rapidly as in practicable and of distributing the same in accordance with the provisions of this will. Said successor Trustee shall also serve without bond and shall possess, to the extent necessary to the winding-up and distribution of the trust estate in a sound, orderly and business-like manner, and in a manner protective of the best interests of the beneficiaries thereof, all of the authority and powers provided for under Article IX of this will. Said successor Trustee is also hereby empowered in its sole discretion to sell and convert into cash the entire trust estate coming into its

Exhibit "1"—(Continued)

hands, in the event that such sale and conversion will, in the opinion of the successor Trustee, enable it to make a more practical division of the cash so realized between the several beneficiaries in the proportions hereinabove specified. In this connection I have in mind that the character of the trust estate, at the time of the termination of the Trust, may be such as to make impracticable or inadvisable a distribution thereof in kind to said beneficiaries in the proportions to which they are respectively entitled under the provisions of subdivision (b) of this Article VIII.

(c) In the event that, for any of the reasons set forth in Sections 41, 42 or 43 of the Probate Code of the State of California, my executors are unable to distribute any portion of my estate in the manner provided for under Articles VII and VIII of this will, then I direct that in such event such portion of my estate shall be distributed, and I give, devise and bequeath the same to the said Elizabeth Elliott and the said Roy H. Elliott, Jr., share and share alike. Should the said Elizabeth Elliott or the said Roy H. Elliott, Jr., predecease me, then his or her share shall go to and vest equally in his or her then surviving issue, per stirpes, and not per capita, or, failing such issue then surviving, in the survivor of the said Elizabeth Elliott and the said Roy H. Elliott, Jr. In this connection, however, I shall expect the said Elizabeth Elliott and the said Roy H. Elliott, Jr. to respect my wishes and intentions in disposing of a portion of my estate for certain

Exhibit "1"—(Continued)

charitable, religious and educational purposes, as specified in Articles VII and VIII of this will, and I am confident that neither of them will voluntarily seek to defeat those wishes and intentions.

Article IX.

To carry out the purpose of the Trusts created by this will, and subject to any of the limitations set forth elsewhere in this will, the trustee shall have the following powers and authority in the administration of said Trusts in addition to those now or hereafter conferred by law, namely:

(a) To hold and retain in the discretion of the Trustee any of the property coming into her or its possession hereunder, in the same form as that in which it is received; also to sell at public or private sale for cash or upon terms, improve, rent, lease (for terms within or extending beyond the expiration of the Trusts), mortgage, transfer, exchange or otherwise deal with the whole or any part of the trust property, upon such terms and conditions as the trustee may deem advisable; to borrow money, to execute a note or notes therefor and to secure the same by the execution of pledges, mortgages or deeds of trust upon the trust properties or any part thereof; to deal with the trust properties as fully and freely as if they were the sole and individual properties of the Trustee; to invest and reinvest the trust estate in the absolute discretion of the Trustee in sound securities without being limited to securities legal for savings banks and trust funds in the State of California.

Exhibit "1"—(Continued)

(b) To compromise, arbitrate or otherwise adjust claims in favor of or against the Trusts; to carry such insurance as the Trustee may deem advisable on all property forming a part of the trust estate.

(c) To advance funds to the Trusts for any trust purpose; such advances with interest at current rates to be a first lien on and to be repaid out of principal or income; to reimburse the Trustee from principal or income for any loss or expense incurred by reason of the holding and preserving by the Trustee of any property from a part of the trust estate.

(d) If the Trustee shall at any time hold securities under the Trusts, the Trustee shall apply the entire net income of such securities as hereinabove directed in this will, irrespective of the price paid for said securities or of their market value at any time; it being intended hereby that no part of such income shall be applied as a sinking fund or otherwise to offset the gradual loss of the premium upon the market value or purchase price of such securities; all stock dividends and amounts received upon the sale of rights to subscribe for stocks or any profits accruing from the exercise of such rights shall be credited to principal and added to the trust estate and held as a part thereof. The Trustee may exercise any right or option of subscription or otherwise, which may at any time attach, belong or be given to the holders of any stocks, bonds, securities or other instruments in the nature

Exhibit "1"—(Continued)

thereof, forming a part of the trust estate; and said Trustee may join in any plan of lease, mortgage, consolidation, reorganization, or foreclosure of any corporation, trust or organization, or of the property or assets thereof in which the trust estate may hold any stocks, bonds or other securities, and may take or hold any securities issued under such plan and pay any assessments thereunder.

(e) In any case in which the Trustee is required, pursuant to the provisions of the Trusts hereby created, to divide the trust estate into parts or shares or to distribute the same, the Trustee is hereby authorized and empowered in the absolute discretion of the Trustee to make such division or distribution in kind or partly in kind and partly in money and for the purpose of such division or distribution, the judgment of the Trustee concerning the propriety thereof and the relative value for the purposes of division or distribution of the property so allotted shall be binding and conclusive upon all persons interested therein; and as hereinabove provided in this will, the corporate successor Trustee is empowered to sell some of the trust property or the whole thereof, should said Trustee deem such sale necessary and to the best interests of the beneficiaries among whom the trust estate is to be divided upon the final termination of the Trusts as herein provided.

(f) In addition to the foregoing, I generally desire to, and do, hereby vest in the Trustee all such

Exhibit "1"—(Continued)

general and particular powers as may be necessary or convenient to enable her or it to attend to all of the business of the trust estate in the most direct and efficient way without being required to apply to any court and without being unduly hampered by personal liability or unfavorable results of any action that such Trustee may take in good faith and in the exercise of reasonable judgment and care.

Article X.

(a) It may not be practical or expedient for my said executors to pay and distribute some, or any, of the specific legacies, bequests and devises provided for in Article VII of this will, within a period of one year after my death. It is accordingly my direction that no interest shall be or become due or payable on any of said legacies, bequests or devises, at any time prior to the actual distribution thereof by my said executors.

(b) Should my wife, Mary T. Lykins, predecease me, thus making the disposition of my estate subject to the provisions of Articles VI, VII, VIII and IX of this will, then I direct that all income received by my executor from all property of my estate, during the administration thereof and prior to the final distribution thereof as provided in said last mentioned articles of this will, shall, to the extent necessary, be used for the payment of probate administration expenses, taxes and other charges or claims against my estate, and for the payment of evpenses incurred or expended in the care, preser-

Exhibit "1"—(Continued)

vation, management and maintaince of all of the property of my estate during administration, and to the extent that such income is not so used or expended it shall become a part of the residue of my estate. In this connection it is my express wish and intention that the right of any devisee or legatee under this will or of any beneficiary under the Trusts hereby created to receive income from any property hereby devised or bequeathed, or to receive income from the trust property, as the case may be, shall in no event accrue until after the date of distribution of such bequest or devise, or, in the case of said trust beneficiaries, until after the date of distribution to the Trustee of the property constituting the trust estate, and not from the date of my death.

Article XI.

I have purposely and intentionally made no provision in this will for any person or persons other than those herein specifically named, whether claiming to be an heir of mine or not. Accordingly, if, notwithstanding the terms and provisions of this will, any person not named as a devisee, legatee or beneficiary herein, whether a legal heir or claiming to be a legal heir of mine, shall establish his or her right to inherit any portion of my estate, then to such person I give and bequeath the sum of One Dollar (\$1.00) and no more. Furthermore, if any person, whether a beneficiary under this will or not mentioned herein, or any legal heir of mine, or any

Exhibit "1"—(Continued)

person claiming under any of them, shall directly or indirectly contest this will or the probate thereof, or object to any of the provisions hereof, or directly or indirectly attack or seek to impair any of its provisions, or conspire with, or voluntarily assist, anyone attempting to do any of those things, then, and in such event, I give and bequeath to each such person so contesting or objecting or attacking the sum of One Dollar (\$1.00) and no more. Such One Dollar (\$1.00) bequest shall be in lieu of the provisions which I have made, or which I might have made, herein for any such person so contesting or objecting to, or attacking, this will and all legacies, bequests, devises or other beneficial interests provided in this will for such person shall revert to, and become a part of, the residue of my estate and shall be disposed of in like manner therewith, as herein provided.

Article XII.

If any paragraph, sentence, clause, phrase or provision of this instrument shall be found to be, or declared to be, invalid, then I hereby declare that the rest and remainder hereof shall stand and be my last will and testament, regardless of any such invalidity of such paragraph, sentence, clause, phrase and/or provision.

In Witness Whereof, I have hereunto set my hand this 21st day of December, 1950.

PRESTON L. LYKINS

The foregoing instrument, consisting of fourteen

(14) pages, including this page, was at the date thereof declared to us by the testator, Preston L. Lykins, to be his last will and testament, and he thereupon, in our presence, both being present at the same time, subscribed his name thereto, and we thereupon, at his request, and in his presence, and in the presence of each other, subscribed our names hereto as attesting witnesses.

JESSE H. MEYER

Residing at 2981-106 Ave., Oakland, Cal.

PAUL S. JORDAN

Residing at 2754 Baker Street, San Francisco, California.

Certification of Copy Attached.

[Endorsed]: Filed Feb. 6, 1951. Martin Monagan, Clerk.

EXHIBIT "2"

122409

WILL

I, Mary T. Lykins, of San Francisco, California, over the age of twenty-one (21) years, being of sound and disposing mind and memory and not acting under duress, menace, fraud or undue influence of any person whomsoever, do make, publish and declare this my last will and testament in the manner following;

Article I

I do hereby revoke any and all wills and codicils to wills previously made by me.

Exhibit "2"—(Continued)

Article II

I hereby declare that I am married and that my husband's name is Preston L. Lykins. I have no children and there are no children of mine now deceased leaving issue now surviving.

Article III

With the exception of my jewelry and personal effects which constitute my separate property, all other property belonging to me, or in which I have any interest, constitutes the community property of my said husband, Preston L. Lykins, and me.

Article IV

I hereby appoint my said husband, Preston L. Lykins, and my niece, Elizabeth G. Williams, of Berkeley, California, as co-executors of this will, and I direct that they shall serve in that capacity without bonds. Should either my said husband or the said Elizabeth G. Williams predecease me, or, if for any reason, either of them shall be unable or unwilling to act as an executor of this will, then I direct that the other of them shall act as sole executor of this will, he or she (as the case may be) to serve without bond. Should my said husband and the said Elizabeth G. Williams both predecease me, or should both of them, for any reason, be unable or unwilling to act as an executor of this will, then I appoint Wells Fargo Bank & Union Trust Co., Market and Montgomery Streets, San Francisco, California, to act as sole executor of this will.

Exhibit "2"—(Continued)

My said executors, in addition to the powers of executors under the law, shall have full power to sell, exchange, lease, mortgage, or pledge any property of my estate, whether real or personal (excluding, however, all items of real and personal property specifically bequeathed under the provisions of this will) and to invest and reinvest monies coming into their hands, all without previous order of court and with or without notice, and upon such terms and conditions as they may deem best, but subject, however, to confirmation by court, as provided by law.

Article V

I give, devise and bequeath all of my property and estate, both real and personal, and wherever situated, to my said husband, Preston L. Lykins, if he shall survive me.

Article VI

If my said husband shall predecease me, then I direct that my said executors shall pay all State Inheritance and Federal Estate taxes due from my estate or from any person interested therein, it being my express wish and intention that each of the hereinafter named legatees, devisees and beneficiaries under this will shall not be charged with, or required to pay, or to contribute toward the payment of, any portion of such taxes, but that their respective shares of my estate, as hereinafter provided, shall go to and vest in them free of any such taxes. In the eventuality contemplated by this

Exhibit "2"—(Continued)

Article VI, i.e., that my said husband shall not survive me, then all such State Inheritance and Federal Estate taxes shall be a charge against, and shall be paid from, the residue of my estate.

Article VII

If my said husband shall predecease me, then my property and estate is hereby disposed of as follows:

(a) I give and bequeath all of my personal effects and jewelry and the entire contents of my family home in San Francisco, California, including, but not restricted to, all furniture, furnishings, dishes, silverware, bric-a-brac, linens and objects of art, situated therein at the time of my death, to my said niece, Elizabeth G. Williams, and to my niece, Eula G. Elliott, also of Berkeley, California, share and share alike, or to the survivor of my said nieces, should one of them predecease me.

(b) I give, devise and bequeath the real property, together with all improvements thereon, situated at 13th and K Streets, Sacramento, California, and commonly known as "No. 1300 K Street," now belonging to, and standing of record in the names of, my said husband and me (provided the said property is owned by me at the time of my death) to my grand-niece, Elizabeth Elliott of Berkeley, California. Should the said Elizabeth Elliott predecease me, then the property mentioned in this subdivision (b) of this Article VII shall go to and vest equally in her living issue by right of representation; or, failing such issue then surviving, in my

Exhibit "2"—(Continued)

grand-nephew, Roy H. Elliott, Jr., if he be living, and if not living, then said property shall constitute and be a part of the residue of my estate and shall be disposed of in like manner therewith.

(c) I give, devise and bequeath the Lykins Ranch in Sacramento County, California, consisting of one hundred twenty-seven (127) acres of land, more or less, now owned and standing of record in the names of my husband and me, together with all improvements, farm equipment, livestock, buildings and the entire contents of all such buildings, including household furniture and furnishings (provided the said ranch property is owned by me at the time of my death) to the said Roy H. Elliott, Jr.; provided, however, that should the said Roy H. Elliott, Jr., predecease me, then the property described in this subdivision (c) of this Article VII shall go to and vest equally in his living issue by right of representation; or, failing such issue then surviving, in the said Elizabeth Elliott if she be living, and if not living, then said ranch property shall constitute and be a part of the residue of my estate and shall be disposed of in like manner therewith.

(d) I give and bequeath the sum of Five Thousand Dollars (\$5,000.00) to my nephew, Stewart Snider, of Monterey, California, if he be living; and, if not living, then to his living issue by right of representation.

(e) I give and bequeath the sum of Three Thou-

Exhibit "2"—(Continued)

sand Dollars (\$3,000.00) to my nephew, Earl Snider, of Denair, California, if he be living; and, if not living, then to his living issue by right of representation.

(f) I give and bequeath the sum of Five Thousand Dollars (\$5,000.00) to the Shriners' Hospital For Crippled Children, a corporation, to be used exclusively for the benefit of the hospital located in the City and County of San Francisco, State of California, owned, operated and maintained by said corporation.

(g) I give and bequeath the sum of Five Thousand Dollars (\$5,000.00) to Washington Lodge No. 20 F. & A.M. of Sacramento, California; such bequest to be used for the perpetual care of that certain cemetery plot standing of record in the names of P.L. Lykins and N. G. Curtis, and situated in the cemetery maintained by the City of Sacramento, California.

(h) I give and bequeath the sum of Two Thousand Five Hundred Dollars (\$2,500.00) to The Masonic Homes of California, a corporation, to be used exclusively for the benefit of the Home for the Aged owned, operated and maintained by said corporation at Decoto, California.

(i) I give and bequeath the sum of Two Thousand Five Hundred Dollars (\$2,500.00) to The Masonic Homes of California, a corporation, to be used exclusively for the benefit of the Home for

Exhibit "2"—(Continued)

Children owned, operated and maintained by said corporation at Covina, California.

(j) I give and bequeath the sum of Ten Thousand Dollars (\$10,000.00) to Robert K. Pattridge, in appreciation of his many years of service to me, provided he is in my employ at the time of my death. Should the said Robert K. Pattridge not be in my employ at the time of my death, then this bequest shall lapse.

(k) I give and bequeath the sum of Ten Thousand Dollars (\$10,000.00) to my good friend, Dr. John Philip Strickler, of San Francisco, California, as a token of my gratitude and friendship, and in appreciation of his many kindnesses toward me.

(1) After carrying out all of the foregoing provisions of this Article VII, after payment by my said executors of all State Inheritance and Federal Estate taxes due from my estate or from any person interested therein, as directed in Article VI of this will, and after payment by my said executors of all debts and claims and expenses of administration, I give, devise and bequeath all of the rest, residue and remainder of my property and estate, both real and personal, and wherever the same may be situated, to the said Elizabeth G. Williams, in trust, nevertheless, to hold, manage and distribute in accordance with the uses and purposes mentioned in Article VIII of this will and under

Exhibit "2"—(Continued)

the terms and conditions mentioned in Article IX hereof. Said trustee shall act without bond.

Article VIII

(a) It is my desire and purpose, in the event that my said husband, Preston L. Lykins, shall predecease me, to devote a substantial part of my estate to religious and charitable uses and purposes, and to make such provision therefor in this will. The said Elizabeth G. Williams, the trustee mentioned in subdivision (1) of Article VII of this will, is fully aware of this desire and purpose and she shall accordingly invest and reinvest the trust property to be distributed to her hereunder, collect the income therefrom, pay all expenses incidental to the administration of the trust, and then apply the net income therefrom as follows:

All of the annual net income from the trust property shall be used by my said Trustee exclusively for religious, charitable and educational purposes. In this connection I direct that such annual income shall be divided and distributed by said Trustee at such times, in such manner, and in such proportions as she in her sole and exclusive discretion shall determine (subject only to the direction that the entire annual net income shall be distributed, and that no part thereof shall be accumulated) among any or all of the following named corporations or institutions:

John Milton Society For The Blind, 156 Fifth Avenue, New York, New York.

Exhibit "2"—(Continued)

Hebrew Evangelization Society, Inc., 2209 Michigan Avenue, Los Angeles, California.

The Fuller Foundation, Pasadena, California. All payments made to this institution are to be used in furthering the religious broadcasting activities of Dr. Charles E. Fuller, during his lifetime, and thereafter to such use as the Board of Directors of the Fuller Foundation shall direct in furthering the objectives of that institution.

American Bible Society, 450, Park Avenue, New York 22, New York.

Gramercy Boys' Club, 380 East 143rd Street, New York, New York.

(b) Upon the death of my said Trustee, Elizabeth G. Williams, the trust shall cease and terminate and the entire principal or corpus of the trust estate together with any accrued or accumulated income thereon shall thereupon vest in and be distributed to the following named beneficiaries in the following proportions:

Twenty percent (20%) thereof to said above mentioned John Milton Society for the Blind.

Twenty percent (20%) thereof to said above mentioned Hebrew Evangelization Society, Inc.

Twenty percent (20%) thereof to said above mentioned The Fuller Foundation. The share of the trust estate so distributed to this beneficiary shall be used in furthering the religious broadcasting activities of Dr. Charles E. Fuller, during his lifetime, and shall, thereafter to the extent that such share

Exhibit "2"—(Continued)

remains unexpended, be used in furthering the objectives of that institution as may be determined in the discretion of its Board of Directors.

Twenty percent (20%) thereof to said above mentioned American Bible Society.

Twenty percent (20%) thereof to said above mentioned Gramercy Boys' Club.

(c) In the event that any of the charitable corporations or institutions hereinabove named in this Article VIII shall not be in existence at the date of the death of my said Trustee, Elizabeth G. Williams, and the consequent termination of the trust, or in the event that any of said charitable corporations or institutions cannot for any reason take and receive the portions of the trust estate hereinabove given to such charitable corporation or institution upon the termination of the trust, then in either of such events, the portion of the trust estate so given to such charitable corporation or institution shall be divided between, and shall vest equally in, the other charitable corporations or institutions hereinabove named which are then in existence and can take and receive the trust property going to them under the terms of his will.

(d) Said Wells Fargo Bank & Union Trust Co. is hereby appointed as successor Trustee to Elizabeth G. Williams and shall, upon the death of said Elizabeth G. Williams and the consequent termination of the trust hereby created, succeed her for the sole purpose of winding-up the administration of

Exhibit "2"—(Continued)

the trust estate as rapidly as is practicable and of distributing the same in accordance with the provisions of this will. Said successor Trustee shall also serve without bond and shall possess, to the extent necessary to the winding-up and distribution of the trust estate in a sound, orderly and business-like manner, and in a manner protective of the best interests of the beneficiaries thereof, all of the authority and powers provided for under Article IX of this will. Said successor Trustee is also hereby empowered in its sole discretion to sell and convert into cash the entire trust estate coming into its hands, in the event that such sale and conversion will, in the opinion of the successor Trustee, enable it to make a more practical division of the cash so realized between the several beneficiaries in the proportions hereinabove specified. In this connection I have in mind that the character of the trust estate, at the time of the termination of the Trust, may be such as to make impracticable or inadvisable a distribution thereof in kind to said beneficiaries in the proportions to which they are respectively entitled under the provisions of subdivision (b) of this Article VIII.

(e) In the event that, for any of the reasons set forth in Sections 41, 42, or 43 of the Probate Code of the State of California, my executors are unable to distribute any portion of my estate in the manner provided for under Articles VII and VIII of this will, then I direct that in such event such portion

Exhibit "2"—(Continued)

of my estate shall be distributed, and I give, devise and bequeath the same to the said Elizabeth Elliott and the said Roy H. Elliott, Jr., share and share alike. Should the said Elizabeth Elliott or the said Roy H. Elliott, Jr., predecease me, then his or her share shall go to and vest equally in his or her then surviving issue, per stirpes, and not per capita, or, failing such issue then surviving, in the survivor of the said Elizabeth Elliott and the said Roy H. Elliott, Jr. In this connection, however, I shall expect the said Elizabeth Elliott and the said Roy H. Elliott, Jr. to respect my wishes and intentions in disposing of a portion of my estate for certain charitable, religious and educational purposes, as specified in Articles VII and VIII of this will, and I am confident that neither of them will voluntarily seek to defeat those wishes and intentions.

Article IX.

To carry out the purposes of the Trust created by this will, and subject to any of the limitations set forth elsewhere in this will, the trustee shall have the following powers and authority in the administration of said Trusts, in addition to those now or hereafter conferred by law, namely:

(a) To hold and retain in the discretion of the Trustee any of the property coming into her or its possession hereunder, in the same form as that in which it is received; also to sell at public or private sale for cash or upon terms, improve, rent,

Exhibit "2"—(Continued)

lease (for terms within or extending beyond the expiration of the Trusts), mortgage, transfer, exchange or otherwise deal with the whole or any part of the trust property, upon such terms and conditions as the trustee may deem advisable; to borrow money, to execute a note or notes therefor and to secure the same by the execution of pledges, mortgages or deeds of trust upon the trust properties or any part thereof; to deal with the trust properties as fully and freely as if they were the sole and individual properties of the Trustee; to invest and reinvest the trust estate in the absolute discretion of the Trustee in sound securities without being limited to securities legal for savings banks and trust funds in the State of California.

(b) To compromise, arbitrate or otherwise adjust claims in favor of or against the Trusts; to carry such insurance as the Trustee may deem advisable on all property forming a part of the trust estate.

(c) To advance funds to the Trusts for any trust purpose; such advances with interest at current rates to be a first lien on and to be repaid out of principal or income; to reimburse the Trustee from principal or income for any loss or expense incurred by reason of the holding and preserving by the Trustee of any property from a part of the trust estate.

(d) If the Trustee shall at any time hold securities under the Trusts, the Trustee shall apply the entire net income of such securities as hereinabove

Exhibit "2"—(Continued)

directed in this will, irrespective of the price paid for said securities or of their market value at any time; it being intended hereby that no part of such income shall be applied as a sinking fund or otherwise to offset the gradual loss of the premium upon the market value or purchase price of such securities; all stock dividends and amounts received upon the sale of rights to subscribe for stocks or any profits accruing from the exercise of such rights shall be credited to principal and added to the trust estate and held as a part thereof. The Trustee may exercise any right or option of subscription or otherwise, which may at any time attach, belong or be given to the holders of any stocks, bonds, securities or other instruments in the nature thereof, forming a part of the trust estate; and said Trustee may join in any plan of lease, mortgage, consolidation, reorganization, or foreclosure of any corporation, trust or organization, or of the property or assets thereof in which the trust estate may hold any stocks, bonds or other securities, and may take or hold any securities issued under such plan and pay any assessments thereunder.

(e) In any case in which the Trustee is required, pursuant to the provisions of the Trusts hereby created, to divide the trust estate into parts or shares or to distribute the same, the Trustee is hereby authorized and empowered in the absolute discretion of the Trustee to make such division or distribution in kind or partly in kind and partly in

Exhibit "2"—(Continued)

money and for the purpose of such division or distribution, the judgment of the Trustee concerning the propriety thereof and the relative value for the purposes of division or distribution of the property so allotted shall be binding and conclusive upon all persons interested therein; and as hereinabove provided in this will, the corporate successor Trustee is empowered to sell some of the trust property or the whole thereof, should said Trustee deem such sale necessary and to the best interests of the beneficiaries among whom the trust estate is to be divided upon the final termination of the Trusts as herein provided.

(f) In addition to the foregoing, I generally desire to, and do, hereby vest in the Trustee all such general and particular powers as may be necessary or convenient to enable her or it to attend to all of the business of the trust estate in the most direct and efficient way without being required to apply to any court and without being unduly hampered by personal liability or unfavorable results of any action that such Trustee may take in good faith and in the exercise of reasonable judgment and care.

Article X.

(a) It may not be practical or expedient for my said executors to pay and distribute some, or any, of the specific legacies, bequests and devises provided for in Article VII of this will, within a period of one year after my death. It is accordingly my

Exhibit "2"—(Continued)

direction that no interest shall be or become due or payable on any of said legacies, bequests or devises, at any time prior to the actual distribution thereof by my said executors.

(b) Should my said husband, Preston L. Lykins, predecease me, thus making the disposition of my estate subject to the provisions of Articles VI, VII, VIII and IX of this will, then I direct that all income received by my executor from all property of my estate, during the administration thereof and prior to the final distribution thereof as provided in said last mentioned articles of this will, shall, to the extent necessary, be used for the payment of probate administration expenses, taxes and other charges or claims against my estate, and for the payment of expenses incurred or expended in the care, preservation, management and maintenance of all of the property of my estate during administration, and to the extent that such income is not so used or expended it shall become a part of the residue of my estate. In this connection it is my express wish and intention that the right of any devisee or legatee under this will or of any beneficiary under the Trusts hereby created to receive income from any property hereby devised or bequeathed, or to receive income from the trust property, as the case may be, shall in no event accrue until after the date of distribution of such request or devise, or, in the case of said trust beneficiaries, until after the date of distribution to the Trustee of the property con-

Exhibit "2"—(Continued)

stituting the trust estate, and not from the date of my death.

Article XI.

I have purposely and intentionally made no provision in this will for any person or persons other than those herein specifically named, whether claiming to be an heir of mine or not. Accordingly, if, notwithstanding the terms and provisions of this will, any person not named as a devisee, legatee or beneficiary herein, whether a legal heir or claiming to be a legal heir of mine, shall establish his or her right to inherit any portion of my estate, then to such person I give and bequeath the sum of One Dollar (\$1.00) and no more. Furthermore, if any person, whether a beneficiary under this will or not mentioned herein, or any legal heir of mine, or any person claiming under any of them, shall directly or indirectly contest this will or the probate thereof, or object to any of the provisions hereof, or directly or indirectly attack or seek to impair any of its provisions, or conspire with, or voluntarily assist, anyone attempting to do any of those things, then, and in such event, I give and bequeath to each such person so contesting or objecting or attacking the the sum of One Dollar (\$1.00) and no more, Such One Dollar (\$1.00) bequest shall be in lieu of the provisions which I have made, or which I might have made, herein for any such person so contesting or objecting to, or attacking, this will and all legacies, bequests, devises or other beneficial interests provided in this will for such person shall revert

Exhibit "2"—(Continued)

to, and become a part of, the residue of my estate, and shall be disposed of in like manner therewith, as herein provided.

Article XII.

If any paragraph, sentence, clause, phrase or provision of this instrument shall be found to be, or declared to be, invalid, then I hereby declare that the rest and remainder hereof shall stand and be my last will and testament, regardless of any such invalidity of such paragraph, sentence, clause, phrase and/or provision.

In Witness Whereof, I have hereunto set my hand this 21st day of December, 1950.

MARY T. LYKINS.

The foregoing instrument, consisting of fourteen (14) pages, including this page, was at the date thereof declared to us by the testatrix, Mary T. Lykins, to be her last will and testament, and she thereupon, in our presence, both being present at the same time, subscribed her name thereto, and we thereupon, at her request, and in her presence, and in the presence of each, subscribed our names hereto as attesting witnesses.

JESSE H. MEYER.

Residing at 2981 - 106th Avenue, Oakland, Cal.

PAUL S. JORDAN.

Residing at 2754 Baker Street, San Francisco, California.

Certification of Copy Attached.

[Endorsed]: Filed Oct. 1, 1951. Martin Mongan, Clerk.

EXHIBIT "4"

In the Superior Court of the State of California,
in and for the City and County of San Francisco.

No. 120126—Dept. 9

In the Matter of the Estate of PRESTON L. LYKINS, also know as P. L. Lykins, Deceased.

DECREE OF SETTLEMENT OF FIRST AND
FINAL ACCOUNT AND OF FINAL DISTRIBUTION.

Elizabeth G. Williams, as executrix of the last will and testament of Preston L. Lykins, also known as P. L. Lykins, deceased, having on the 1st day of June, 1953, rendered and filed herein a full account and report of her administration of said estate, which account was for a final settlement, and having with said account filed a petition for the settlement thereof and for final distribution of said estate, and said final account and petition having come on regularly for hearing on this day, proof having been made to the satisfaction of the court that notice of the settlement of said final account and of the hearing of said petition had been duly given by the clerk in the manner and for the time provided by law, and no one appearing to except to or contest said account and petition, and it appearing to the court and the court finding:

That Preston L. Lykins, alias, died on or about the 8th day of January, 1951, in the City and

Exhibit "4"—(Continued)

County of San Francisco, State of California, being then a resident of said City, County and State; that said decedent left a last will and testament dated the 21st day of December, 1950, which was filed herein on the 3rd day of February, 1951, together with a petition for the probate of the same and for the appointment of said petitioner and Mary T. Lykins as executrices thereof; that subsequent thereto and after due and regular proceedings to that end had and taken, the said last will and testament of said decedent was by an order duly given and made on the 19th day of February, 1951, admitted to probate as the last will and testament of said Preston L. Lykins, alias, deceased, and by the same order said petitioner and Mary T. Lykins were appointed executrices thereof; that Mary T. Lykins and said petitioner qualified as such executrices and Letters Testamentary were duly issued to them on the 20th day of February, 1951, and from said last mentioned date to the 18th day of September, 1951, Mary T. Lykins and said petitioner were continuously the duly appointed, qualified and acting executrices of the last will and testament of said decedent; that Mary T. Lykins died on the 18th day of September, 1951, and since said last mentioned date said petitioner, Elizabeth G. Williams, has been continuously and now is the sole surviving executrix of the last will and testament of said Preston L. Lykins, alias, deceased;

That notice to creditors was duly given by pub-

Exhibit "4"—(Continued)

lication as required by law; that within thirty days after the completion of the publication of said notice to creditors said petitioner filed herein an affidavit showing the due publication of notice to creditors, containing a copy of the notice and stating the date of the first publication thereof and the name of the newspaper in which the same was printed;

That more than six months have elapsed since the appointment of said petitioner as such executrix and more than six months have expired since the first publication of notice to creditors;

That on the 18th day of September, 1951, said petitioner duly made and returned to this court a true Inventory and Appraisement of all the estate of said decedent which had come to her possession or knowledge;

That on the 27th day of October, 1952, the Inheritance Tax Appraiser appointed herein filed his report showing the inheritance taxes due to the State of California by reason of the death of said decedent; that on the 22nd day of January, 1953, an amended inheritance tax report was filed; that said taxes have been paid;

That the first and final account presented by said executrix to this court is a full, true and correct account and report of her administration of said estate from the date of appointment to the 1st day of May, 1953; that since the date of filing said first and final account, said petitioner has received dividends and rents in the total sum of \$2,976.07;

Exhibit "4"—(Continued)

That the statement showing the claims against said estate which were presented or filed, and allowed and paid, which is attached to said first and final account, is full, true and correct;

That the statement attached to said first and final account showing the commission of said executrix and the fee of her attorneys, Messrs. Heller, Ehrman, White & McAuliffe, is correct;

That the statement of assets belonging to said estate which is attached to said first and final account is full, true and correct;

That the Federal Estate Tax Return and the Federal and/or State of California income tax returns of the decedent and the estate of said decedent have not yet been audited; that said petitioner should be authorized to reserve the sum of five thousand dollars (\$5,000) as and for payment of any deficiency in Federal Estate and/or income tax and/or State of California income tax not now ascertained for which the estate of said decedent or said petitioner, as executrix, might be liable.

That all the debts of said estate and of said decedent, all claims and expenses of administration of said estate thus far incurred, and all taxes which have attached to or accrued against said estate, including personal property tax and Federal estate tax (subject, however, to audit of the latter), have been paid and discharged, and said estate is now in a condition to be closed;

That by the terms of the last will and testament

Exhibit "4"—(Continued)

of the said Preston L. Lykins, alias, deceased, his entire estate was given, devised, and bequeathed unto Mary T. Lykins, his wife; that said Mary T. Lykins survived said Preston L. Lykins, alias, but herself died on or about the 18th day of September, 1951; that subsequent thereto and pursuant to proceedings had and taken in the Superior Court of the City and County of San Francisco, State of California, the last will and testament of the said Mary T. Lykins was admitted to probate and on October 15, 1951, Letters Testamentary were issued to Elizabeth G. Williams; that ever since said last mentioned date and at the present time said Elizabeth G. Williams has been and now is the duly appointed, qualified and acting executrix of the last will and testament of Mary T. Lykins, deceased;

That by reason of the fact that Mary T. Lykins survived this decedent, the entire net estate of the estate of Preston L. Lykins, alias, deceased, should be distributed to Elizabeth G. Williams in her capacity as the executrix of the last will and testament of Mary T. Lykins, deceased;

That by a decree of partial distribution made, entered and filed on the 30th day of March, 1953, in the matter of the above-entitled estate, there was distributed from said estate unto the estate of Mary T. Lykins, deceased, for the purpose of administration of the matter of the latter estate, the undivided one-half ($\frac{1}{2}$) interest owned by Preston L. Lykins at the time of his death in that certain real

Exhibit "4"—(Continued)

property situate in the County of Sacramento, State of California, and more specifically described on pages 2 and 3 of the Inventory and Appraisement on file herein;

That no person interested in the estate of said Preston L. Lykins, alias, deceased, or in any of the property of said estate or otherwise or at all, is now in the military service of the United States of America within the meaning of the Act of Congress of the United States of America approved May 14, 1940, and known and cited as the "Soldiers' and Sailors' Civil Relief Act of 1940";

It Is Therefore Ordered, Adjudged and Decreed that notice to creditors has been duly given.

It Is Further Ordered, Adjudged and Decreed that the first and final account of said executrix be and the same is hereby settled, allowed and approved as rendered and presented for settlement, and that said executrix be and she is hereby allowed the sum of five hundred dollars (\$500) as and for closing expenses.

It Is Further Ordered, Adjudged and Decreed that said executrix be and she is hereby authorized to reserve the sum of five thousand dollars (\$5,000) as and for payment of any deficiency in Federal Estate Tax and/or income tax and/or State of California income tax not now ascertained;

It Is Further Ordered, Adjudged and Decreed that said executrix be and she is hereby directed to pay unto herself the sum of four thousand nine

Exhibit "4"—(Continued)

hundred seventy-two dollars and forty cents (\$4,972.40) as and for her compensation for ordinary services rendered by her during the administration of said estate.

It Is Further Ordered, Adjudged and Decreed that said executrix be and she is hereby directed to pay unto Messrs. Heller, Ehrman, White & McAuliffe, attorneys for executrix, the sum of two thousand five hundred twenty-five dollars and thirteen cents (\$2,525.13), representing the balance of four thousand nine hundred seventy-two dollars and forty cents (\$4,972.40) statutory attorneys' fees;

It Is Further Ordered, Adjudged and Decreed that no person interested in the estate of said decedent or in any of the property of said estate or otherwise or at all is now in the military service of the United States of America within the meaning of the Act of Congress of the United States of America approved May 14, 1940, and known and cited as the "Soldiers' and Sailors' Civil Relief Act of 1940."

It Is Further Ordered, Adjudged and Decreed that all the rest, residue and remainder of the estate of said Preston L. Lykins, also known as P. L. Lykins, deceased, hereinafter particularly described, and any other property not now known or discovered which may belong to said estate, or in which said estate may have any interest, and any property which is herein imperfectly or incorrectly described, be and the same is hereby distributed and

Exhibit "4"—(Continued)

said executrix is hereby directed to pay, transfer, and deliver the same unto Elizabeth G. Williams, as executrix of the estate of Mary T. Lykins, deceased, for the purpose of administration in the matter of the latter estate.

The following is a particular description of the said residue of said estate referred to in this decree and of which distribution is ordered, adjudged and decreed as aforesaid, to-wit:

Cash in the sum of.....\$ 6,482.68

Furniture and Furnishings and Other Personal
Property:

Clothing and miscellaneous men's jewelry. Gold coins of a value of approximately \$25.

One-half interest in furniture and furnishings in six-room apartment at 1000 Mason Street, San Francisco.

One-half interest in furniture and furnishings in nine-room ranch house and miscellaneous farming equipment situated Parcel One referred to in inventory.

Real Estate: All that certain real property situate in the City or Sacramento, County of Sacramento, State of California, and described as follows:

Parcel One: Lot One (1) in the block or square bounded by K and L and Thirteenth and Fourteenth Streets, according to the official survey of said City of Sacramento, State of California, as per

Exhibit "4"—(Continued)

map or plan thereof, on file in the office of the County Recorder of said Sacramento County.

Parcel Two: The West 50 feet of Lot Eight (8) in the block or square bounded by G and H and Sixteenth and Seventeenth Streets, according to the official survey of said City of Sacramento, State of California, as per map or plan thereof on file in the office of the County Recorder of said Sacramento County.

Parcel Three: The West half of Lot Four (4) and all of Lots Five (5) and Six (6) in the Block or square bounded by G and H and Fifteenth and Sixteenth Streets, according to the official survey of the said City of Sacramento, State of California, as per map or plan thereof on file in the office of the County Recorder of said Sacramento County.

Parcel Four: The North $37\frac{1}{2}$ feet of the South 60 feet of Lot One (1) in the block or square bounded by I and J and Fourth and Fifth Streets, according to the official survey of the said City of Sacramento, State of California, as per map or plan thereof on file in the office of the County Recorder of said Sacramento County.

Parcel Five: The North 40 feet of Lot One (1) in the block or square bounded by M and N and Fourth and Fifth Streets, and the South 20 feet of the North 60 feet of said Lot One (1) in said block and square, according to the official survey of the said City of Sacramento, State of California, as per

Exhibit "4"—(Continued)

map or plan thereof on file in the office of the County Recorder of said Sacramento County.

Parcel Six: The North 20 feet of the West 60 feet of the South 80 feet of Lot One (1) in the block bounded by and between I and J, Fourth and Fifth Streets, as per the official map or plat thereof on file in the office of the County Recorder of the County of Sacramento, State of California.

Parcel Seven: The East half of Lot 7 in the block bounded by K and L, Thirteenth and Fourteenth Streets of the City of Sacramento, according to the official map or plan of said City.

Parcel Eight: The West $\frac{1}{2}$ of Lot 6, in the block bounded by 13th and 14th and K and L Streets of the City of Sacramento, according to the official plat thereof.

Securities:

100 shs. General Motors Corporation common stock, \$10 par value.

An Undivided one-half interest in the following:

300 shs. American Telephone & Telegraph Co. capital stock, no par value.

1150 shs. California Packing Corporation common stock, no par value.

50 shs. Continental Can Company, Inc. common stock, no par value.

100 shs. General Electric Company, common stock, no par value.

100 shs. Illinois Power Company, common stock, no par value.

Exhibit "4"—(Continued)

100 shs. National Biscuit Company, common stock,
no par value.

315 shs. National Lead Company, common stock,
no par value.

200 shs. Pacific Gas & Electric Co. 6% 1st preferred stock, no par value.

300 shs. Pacific Gas & Electric Company common stock, no par value.

50 shs. Pacific Power & Light Company 5% preferred stock, no par value.

112 shs. Pacific Telephone & Telegraph Company common stock, \$100 par value.

50 shs. Pacific Telephone & Telegraph Company preferred stock, \$100 par value.

242 shs. Richfield Oil Corp. common stock, no par value.

130 shs. Shell Union Oil Corp. common stock, no par value.

175 shs. Southern California Edison Company, 4.32% Series cumulative preferred stock, \$25 par value.

175 shs. Southern California Edison Company, 4.48% Series cumulative preferred stock.

564 shs. Standard Oil Company of California capital stock, no par value.

100 shs. The Chase National Bank, capital stock, no par value.

150 shs. United States steel Corporation common capital stock, no par value.

Exhibit "4"—(Continued)

Done in open Court this 12th day of June, 1953.

T. I. FITZPATRICK,
Judge of the Superior Court.

Recorded Aug. 7, 1953.

[Endorsed]: Filed June 16, 1953. Martin Mon-
gan, Clerk.

EXHIBIT "6"

In The Superior Court of the State of California,
In and For The City and County of San Fran-
cisco

No. 122409—Dept. 9

In the Matter of the Estate of MARY T. LYKINS,
Deceased.

DECREE OF SETTLEMENT OF FIRST AND
FINAL ACCOUNT AND OF FINAL DIS-
TRIBUTION

Elizabeth G. Williams, as executrix of the last Will and Testament of Mary T. Lykins, deceased, having on the 9th day of July, 1953, rendered and filed herein a full account and report of her administration of said estate, which account was for a final settlement, and having with said account filed a petition for the settlement thereof and for final distribution of said estate, and said final ac-

Exhibit "6"—(Continued)

count and petition having come on regularly for hearing on the 23rd day of July, 1953, proof having been made to the satisfaction of the court that notice of the settlement of said final account and of the hearing of said petition had been duly given by the clerk in the manner and for the time provided by law, and no one appearing to except to or contest said account and petition, and it appearing to the court and the court finding:

That Mary T. Lykins died on or about the 18th day of September, 1951, in the City and County of San Francisco, State of California, being then a resident of said City, County and State; that decedent left a last Will and Testament, dated the 21st day of December, 1950, which was filed herein on the 1st day of October, 1951, together with a petition for the probate of the same and for the appointment of said petitioner as executrix thereof; that subsequent thereto and after due and regular proceedings to that end had and taken, the said last Will and Testament of said decedent was by an order duly given and made on the 15th day of October, 1951, admitted to probate as the last Will and Testament of Mary T. Lykins, deceased, and by the same order said petitioner was appointed executrix thereof; that said petitioner qualified as such executrix and Letters Testamentary were duly issued to her on October 15, 1951, and from said last mentioned date said petitioner has been the duly appointed, qualified and acting executrix of the last Will and Testament of said decedent;

Exhibit "6"—(Continued)

That notice to creditors was duly given by publication as required by law; that within thirty days after the completion of the publication of said notice to creditors, said petitioner filed herein an affidavit showing the due publication of notice to creditors, containing a copy of the notice and stating the date of the first publication thereof and the name of the newspaper in which the same was printed;

That more than six months have elapsed since the appointment of said petitioner as such executrix and more than six months have expired since the first publication of notice to creditors;

That on the 22nd day of October, 1952, said petitioner duly made and returned to this Court a true Inventory and Appraisement of all the estate of said decedent which had come to her possession or knowledge;

That on the 26th day of January, 1953, the Inheritance Tax Appraiser appointed herein filed his report showing the inheritance taxes due to the State of California by reason of the death of said decedent; that said taxes have been paid;

That the first and final account presented by said executrix to this court is a full, true and correct account and report of her administration of said estate from the date of appointment to the 12th day of June, 1953; that subsequent to said date, said petitioner has received additional income, consisting of dividends, rents and savings deposit interest, in the total sum of \$5,940.20; that the total cash presently in the possession of said petitioner and

Exhibit "6"—(Continued)

available for distribution or the withholding therefrom as hereinafter decreed, amounts to the sum of \$66,372.17;

That the statement showing the claims against said estate which were presented or filed, and allowed and paid, which is attached to said first and final account, is full, true and correct;

That the statement attached to said first and final account showing the commission of said executrix and the fee of her attorneys, Messrs. Heller, Ehrman, White & McAuliffe, is correct;

That the statement of assets belonging to said estate which is attached to said first and final account is true and correct, except for the inadvertent omission from said statement of the following described United States of America Series E Savings Bonds, which are still in the possession of said petitioner and are available for final distribution:

\$5000 m.v. United States Saving bonds, Series E, issued August, 1943.

\$10,000 m.v. United States Savings bonds, Series E, issued September, 1944.

\$5000 m.v. United States Saving bonds, Series E, issued August, 1946.

\$10,000 m.v. United States Savings bonds, Series E, issued November, 1947;

That the Federal Estate Tax Return and the Federal and/or State of California income tax returns of the decedent and the estate of said decedent have not yet been audited; that said petitioner should be authorized to reserve the sum of \$20,000.00

Exhibit "6"—(Continued)

as and for payment of any deficiency in Federal Estate and/or income tax and/or State of California income tax not now ascertained for which the estate of said decedent or said petitioner, as executrix, might be liable; that, in addition to said reserve, the trustee of the trust hereinafter declared should be directed to pay and satisfy from the principal of the trust estate any deficiency in excess of said \$20,000.00 on account of any or all of said taxes;

That all the debts of the said estate and of said decedent, all claims and expenses of administration of said estate thus far incurred, and all taxes which have attached to or accrued against said estate, including personal property tax and Federal estate tax (subject, however, to audit of the latter), have been paid and discharged, and said estate is now in a condition to be closed;

That although the statutory fees of said executrix' attorneys, Heller, Ehrman, White & McAuliffe, based on the value, as of date of death, of the assets reported in the Inventory and Appraisement on file herein would amount to the sum of \$8,881.39, said attorneys have agreed to reduce their said fee to the sum of \$6,231.39; that of said sum, \$3,115.95 heretofore has been paid on account, the balance of \$3,115.44 due and owing;

That by the terms of the last Will and Testament of said decedent, there was given, devised and bequeathed unto the persons hereinafter named:

(a) Elizabeth G. Williams and Eula G. Elliott,

Exhibit "6"—(Continued)

nieces of decedent, in equal shares, all the personal effects, jewelry and the entire contents of decedent's home in San Francisco, California;

(b) Elizabeth Elliott, grand-niece of decedent, real property commonly known as 1300 K Street, Sacramento, California;

(c) Roy H. Elliott, Jr., grand-nephew of said decedent, the Lykins Ranch, consisting of 127 acres in Sacramento County, California, together with all farm equipment, livestock, household furniture and furnishings;

(d) Stewart Snider, nephew of decedent, the sum of \$5,000.00;

(e) Earl Snider, nephew of decedent, the sum of \$3,000.00;

(f) Shriners' Hospital For Crippled Children, a corporation, the sum of \$5,000.00;

(g) Washington Lodge No. 20 F. & A.M. of Sacramento, California, the sum of \$5,000.00;

(h) The Masonic Homes of California, a corporation, the sum of \$2,500.00; (Home for Aged);

(i) The Masonic Homes of California, a corporation, the sum of \$2,500.00, (Home for Children);

(j) Robert K. Pattridge, the sum of \$10,000.00;

(k) Dr. John Philip Strickler, the sum of \$10,000.00;

(l) Elizabeth G. Williams, as Trustee, the entire rest, residue and remainder of the estate of said decedent, in trust for the uses and purposes

Exhibit "6"—(Continued)

mentioned in Article VIII of decedent's last Will and Testament;

That by a decree of partial distribution duly given, made and entered by the above-entitled court on the 27th day of February, 1953, all the cash bequests described in paragraphs (d) through (k) inclusive, of the preceding paragraphs were ordered distributed to the legatees therein named and each of said legacies has been paid in full;

That by the terms of Article X (b) of decedent's last Will and Testament, she directed that all income received by said petitioner from all the property of her estate during the course of administration thereof and prior to final distribution should be used for the payment of taxes, claims and expenses of administration, and that such part of said income not used in such administration should become a part of the residue of the estate; that said Article in said sub-paragraph declared the express wish and intention of decedent that no devisee or legatee or any beneficiary under the trust created by said Will to receive income should be entitled to receive the same until after the date of distribution of such bequest or devise; that no part of the income of the estate of said decedent from date of death until the date of this decree is properly distributable to any legatee, devisee or trust beneficiary named in the will;

That since the date of death of said Mary T. Lykins, deceased, a portion of the real property, known as the Lykins Ranch, specifically devised to

Exhibit "6"—(Continued)

the grand-nephew of decedent, Roy H. Elliott, Jr., was conveyed by said petitioner to Sacramento & San Joaquin Drainage District pursuant to an order of the above-entitled court made and entered July 28, 1952, by reason of the fact that said decedent during her lifetime entered into an agreement with said District to convey a portion of said Ranch for right-of-way and easement purposes, which said agreement was not consummated prior to her death;

That no person interested in the estate of said Mary T. Lykins, deceased, or in any of the property of said estate or otherwise, or at all, is now in the military service of the United States of America within the meaning of the Act of Congress of the United States of America approved May 14, 1940, and known and cited as the "Soldiers' and Sailors' Civil Relief Act of 1940";

It Is Therefore Ordered, Adjudged and Decreed that notice to creditors has been duly given;

It Is Further Ordered, Adjudged and Decreed that no person interested in the estate of said decedent or in any of the property of said estate, or otherwise or at all, is now in the military service of the United States of America within the meaning of the Act of Congress of the United States of America approved May 14, 1940, and known and cited as the "Soldiers' and Sailors' Civil Relief Act of 1940";

It Is Further Ordered, Adjudged and Decreed that the first and final account of said executrix be

Exhibit "6"—(Continued)

and the same is hereby settled, allowed and approved as rendered and presented for settlement, and that said executrix be and she hereby is allowed the sum of \$500.00 as and for closing expenses;

It Is Further Ordered, Adjudged and Decreed that the said executrix be and she hereby is authorized to reserve the sum of \$20,000.00 as and for payment of any deficiency in Federal Estate Tax and/or income tax and/or State of California income tax not now ascertained;

It Is Further Ordered, Adjudged and Decreed that said executrix be and she hereby is authorized and directed to pay unto herself the sum of \$8,881.39 as and for her compensation for ordinary services rendered by her during the administration of said estate;

It Is Further Ordered, Adjudged and Decreed that said executrix be and she hereby is authorized and directed to pay unto Messrs. Heller, Ehrman, White & McAuliffe, attorneys for executrix, the sum of \$3,115.44, representing the balance of the agreed fee of \$6,231.39;

It Is Further Ordered Adjudged and Decreed that the executrix be and she hereby is authorized and directed to distribute to Elizabeth G. Williams and Eula G. Elliott, nieces of decedent, in equal shares, the following described personal property:

Clothing and miscellaneous men's jewelry.

Gold coins of a value of approximately \$25.

Exhibit "6"—(Continued)

Furniture and furnishings in six-room apartment at 1000 Mason Street, San Francisco, California.

1 white metal bracelet with many white stones.

1 White metal ring with three large white stones.

1 white metal ring with one large white stone.

1 string of white pearls with seven white stones on clip.

1 yellow metal and blue watch.

1 unset purple stone.

1 white metal clip pin with one large, ten smaller and many small white stones.

1 yellow metal pin with one white stone and many pearl-like stones.

1 yellow metal pin with small white stones.

Miscellaneous jewelery.

1 six-skin Russian sable scarf.

1 grey Broadtail coat.

1 dyed Ermine coat.

1 three-skin Fisher scarf.

1 black Alaska Seal coat.

1 natural silver fox scarf, one skin,

together with all other personal effects and jewelry owned by decedent but not now known or discovered.

It Is Further Ordered, Adjudged and decreed that the following described real property be and it is hereby distributed unto Elizabeth Elliott, grand-niece of decedent,

All that certain real property situate in the City of Sacramento, County of Sacramento, State of

Exhibit "6"—(Continued)

California, and more particularly described:

Lot One (1) in the block or square bounded by K and L and Thirteenth and Fourteenth Streets, according to the official survey of said City of Sacramento, State of California, as per map or plan thereof, on file in the office of the County Recorder of said Sacramento County.

It Is Further Ordered, Adjudged and Decreed that the following described real property, together with all improvements, farming equipment, livestock and the entire contents of all buildings situated on said premises, be and the same hereby is distributed unto Roy H. Elliott, Jr.:

All that certain real property situate in the County of Sacramento, State of California, and more particularly described as follows:

One hundred six $31/100$ acres of Swamp and Overflowed land situated in Sacramento County, State of California, and described as follows, to-wit: Survey No. 337, Swamp and Overflowed Lands situated in Sections Three (3), Four (4), Nine (9) and Ten (10), Township Four (4) North Range Four (4) East, Mount Diablo Base and Meridian and being fractional South half of Southwest quarter and fractional Southwest quarter of Southeast quarter of Section Three (3); a fractional East half of Southeast quarter of Section Four (4); fractional Northeast quarter of Northeast quarter of Section Nine (9) and fraction in North half of Northwest quarter and fractional Northwest quarter of Northeast quarter of Section Ten (10), and

Exhibit "6"—(Continued)

more particularly designated and described in the field notes of said survey as follows.

Beginning at a stake on the bank of Georgiana Slough, said stake is the West corner of Swamp Land Survey No. 336, thence South $65^{\circ} 00'$ E 5891 chains to the South corner of the above-named survey; thence South 3.06 chains; thence North $87^{\circ} 30'$ W. 64.39 chains to a stake on the bank of Georgiana Slough marked "Westfall and Debald"; thence meandering up said Slough North $6^{\circ} 45'$ West 20.0 chains; North $33^{\circ} 37'$ East 5.14 chains; North $88^{\circ} 30'$ East 4.40 chains; North $81^{\circ} 30'$ East 6.09 chains to the place of beginning run by the true meridian, Magnetic variation $16^{\circ} 25'$ E., being the same land granted to Benoni Westfall by the State of California, by a patent in Book No. 1 of Patents, Sacramento, County Records on pages 221 and 222, also described in a grant by Benoni Westfall to Rebecca Jane Westfall and recorded in Book 113 of Deeds, page 567 of said Records.

Also, that portion of Swamp and Overflowed Land Survey No. 338, Sacramento County Surveys, being a portion of Section 10, Township 4 North, Range 4 East M.D.B. & M., being more particularly described as follows:

Beginning at the Northeast corner of Swamp Land Survey 338; thence Southerly along the East line of said Survey, 740.3 feet; thence North $70^{\circ} 38'$ West a distance of 2545 feet, more or less, to a point on the North line of said Swamp Land Survey 338, said point being located North $87^{\circ} 30'$ West

Exhibit "6"—(Continued)

2381.0 feet from the Northeast corner of said survey; thence South 87° 30' East along said North line, a distance of 2381 feet to the point of beginning. Saving and Excepting an undivided one-half interest in and to all minerals, mineral deposits, oil, gas and other hydro-carbon substances of every kind and character contained in or upon said premises, together with the continuing right of entry for the full enjoyment of said rights so excepted and reserved including development work, boring of wells, making of excavations, installations, maintenance and operation of pipe lines, storage tanks and other requisite structures and removal of said substances so excepted and reserved by all usual, convenient and necessary means, but subject to the obligation to make just compensation for any injury or damage to growing crops or other improvements on said premises occasioned by the exercise of any of said rights so excepted and reserved as aforesaid, all as contained in the following deeds:

(a) Deed from Donald Seymour, also known as Donald I. Seymour, and Doris Seymour Hutchinson to Fong Yock Yee, dated October 9, 1943, recorded October 21, 1943, in Book 1026 of Official Records, at page 333;

(b) Deed from California-Western States Life Insurance Company, to Fonk Yock Yee, dated October 12, 1943, recorded October 21, 1943, in Book 1026 of Official Records, at page 332;

Subject, Further, to those certain rights-of-way, easements and other interests in and to a portion

Exhibit "6"—(Continued)

of said Parcel, granted to Sacramento and San Joaquin Drainage District, by Elizabeth G. Williams, executrix, pursuant to an order of the Probate Court having jurisdiction of the estate of said decedent (made and entered July 28, 1952) and directing a conveyance of real property sold on contracts by decedent.

It Is Further Ordered, Adjudged and Decreed that all the rest, residue and remainder of the estate of Mary T. Lykins, deceased, hereinafter particularly described, and any other property (excepting jewelry and/or personal effects) not now known or discovered which may belong to said estate, or in which said estate may have any interest, and any property which is herein imperfectly or incorrectly described, be and the same is hereby distributed and said executrix is hereby directed to pay, transfer, and deliver the same unto Elizabeth G. Williams, in trust (without bond), nevertheless, upon the uses and trusts declared in Articles VIII and IX of decedent's Will as follows:

"The said Elizabeth G. Williams, the trustee, * * * shall accordingly invest and reinvest the trust property to be distributed to her hereunder, collect the income therefrom, pay all expenses incidental to the administration of the trust, and then apply the net income therefrom as follows:

All of the annual net income from the trust property shall be used by my said Trustee exclusively for religious, charitable and educational purposes. In this connection I direct that such annual income

Exhibit "6"—(Continued)

shall be divided and distributed by said Trustee at such times, in such manner, and in such proportions as she in her sole and exclusive discretion shall determine (subject only to the direction that the entire annual net income shall be distributed, and that no part thereof shall be accumulated) among any or all of the following named corporations or institutions:

John Milton Society for the Blind, 156 Fifth Avenue, New York, New York.

Hebrew Evangelization Society, Inc., 2209 Michigan Avenue, Los Angeles, California.

The Fuller Foundation, Pasadena, California. All payments made to this institution are to be used in furthering the religious broadcasting activities of Dr. Charles E. Fuller, during his lifetime, and thereafter to such use as the Board of Directors of the Fuller Foundation shall direct in furthering the objectives of that institution.

American Bible Society, 450 Park Avenue, New York 22, New York.

Gramercy Boys' Club, 380 East 143rd Street, New York, New York.

Upon the death of my said Trustee, Elizabeth G. Williams, the trust shall cease and terminate and the entire principal or corpus of the trust estate together with any accrued or accumulated income thereon shall thereupon vest in and be distributed to the following named beneficiaries in the following proportions:

Exhibit "6"—(Continued)

Twenty percent (20%) thereof to said above mentioned John Milton Society for the Blind.

Twenty percent (20%) thereof to said above mentioned Hebrew Evangelization Society, Inc.

Twenty percent (20%) thereof to said above mentioned The Fuller Foundation. The share of the trust estate so distributed to this beneficiary shall be used in furthering the religious broadcasting activities of Dr. Charles E. Fuller, during his lifetime, and shall, thereafter to the extent that such share remains unexpended, be used in furthering the objectives of that institution as may be determined in the discretion of its Board of Directors.

Twenty percent (20%) thereof to said above mentioned American Bible Society.

Twenty percent (20%) thereof to said above said mentioned Gramercy Boys' Club.

In the event that any of the charitable corporations or institutions hereinabove named in this Article VIII shall not be in existence at the date of the death of my said Trustee, Elizabeth G. Williams, and the consequent termination of the trust, or in the event that any of said charitable corporations or institutions cannot for any reason take and receive the portions of the trust estate hereinabove given to such charitable corporation or institution upon the termination of the trust, then in either of such events, the portion of the trust estate so given to such charitable corporation or institution shall be divided between, and shall vest equally in, the other charitable corporations or in-

Exhibit "6"—(Continued)

stitutions hereinabove named which are then in existence and can take and receive the trust property going to them under the terms of this Will.

Said Wells Fargo Bank & Union Trust Co. is hereby appointed as successor Trustee to Elizabeth G. Williams and shall, upon the death of said Elizabeth G. Williams and the consequent termination of the trust hereby created, succeed her for the sole purpose of winding-up the administration of the trust estate as rapidly as is practicable and of distributing the same in accordance with the provisions of this Will. Said successor Trustee shall also serve without bond and shall possess, to the extent necessary to the winding-up and distribution of the trust estate in a sound, orderly and business-like manner, and in a manner protective of the best interests of the beneficiaries thereof, all of the authority and powers provided for under Article IX of this Will. Said successor Trustee is also hereby empowered in its sole discretion to sell and convert into cash the entire trust estate coming into its hands, in the event that such sale and conversion will, in the opinion of the successor Trustee, enable it to make a more practical division of the cash so realized between the several beneficiaries in the proportions hereinabove specified. In this connection I have in mind that the character of the trust estate, at the time of the termination of the Trust, may be such as to make impracticable or inadvisable a distribution thereof in kind to said beneficiaries in the proportions to which they are respectively en-

Exhibit "6"—(Continued)

titled under the provisions of subdivision (b) of this Article VIII.

To carry out the purposes of the Trusts created by this will, and subject to any of the limitations set forth elsewhere in this Will, the trustee shall have the following powers and authority in the administration of said Trusts, in addition to those now or hereafter conferred by law, namely:

To hold and retain in the discretion of the Trustee any of the property coming into her or its possession hereunder, in the same form as that in which it is received; also to sell at public or private sale for cash or upon terms, improve, rent, lease (for terms within or extending beyond the expiration of the Trusts), mortgage, transfer, exchange or otherwise deal with the whole or any part of the trust property, upon such terms and conditions as the Trustee may deem advisable; to borrow money, to execute a note or notes therefor and to secure the same by the execution of pledges, mortgages or deeds of trust upon the trust properties or any part thereof; to deal with the trust properties as fully and freely as if they were the sole and individual properties of the Trustee; to invest and reinvest the trust estate in the absolute discretion of the Trustee in sound securities without being limited to securities legal for savings banks and trust funds in the State of California.

To compromise, arbitrate or otherwise adjust claims in favor of or against the Trusts; to carry such insurance as the Trustee may deem advisable

Exhibit "6"—(Continued)

on all property forming a part of the trust estate.

To advance funds to the Trusts for any trust purpose; such advances with interest at current rates to be a first lien on and to be repaid out of principal or income; to reimburse the Trustee from principal or income for any loss or expense incurred by reason of the holding and preserving by the Trustee of any property from a part of the trust estate.

If the Trustee shall at any time hold securities under the Trusts, the Trustee shall apply the entire net income of such securities as hereinabove directed in this Will, irrespective of the price paid for said securities or of their market value at any time; it being intended hereby that no part of such income shall be applied as a sinking fund or otherwise to offset the gradual loss of the premium upon the market value or purchase price of such securities; all stock dividends and amounts received upon the sale of rights to subscribe for stocks or any profits accruing from the exercise of such rights shall be credited to principal and added to the trust estate and held as a part thereof. The Trustee may exercise any right or option of subscription or otherwise, which may at any time attach, belong or be given to the holders of any stocks, bonds, securities or other instruments in the nature thereof, forming a part of the trust estate; and said Trustee may join in any plan of lease, mortgage, consolidation, reorganization, or foreclosure of any corporation, trust or organization, or of the property

Exhibit "6"—(Continued)

or assets thereof in which the trust estate may hold any stocks, bonds or other securities, and may take or hold any securities issued under such plan and pay any assessments thereunder.

In any case in which the Trustee is required, pursuant to the provisions of the Trusts hereby created, to divide the trust estate into parts or shares or to distribute the same, the Trustee is hereby authorized and empowered in the absolute discretion of the Trustee to make such division or distribution in kind or partly in kind and partly in money and for the purpose of such division or distribution, the judgment of the Trustee concerning the propriety thereof and the relative value for the purposes of division or distribution of the property so allotted shall be binding and conclusive upon all persons interested therein; and as hereinabove provided in this Will, the corporate successor Trustee is empowered to sell some of the trust property or the whole thereof, should said Trustee deem such sale necessary and to the best interests of the beneficiaries among whom the trust estate is to be divided upon the final termination of the Trusts as herein provided.

If addition to the foregoing, I generally desire to, and do, hereby vest in the Trustee all such general and particular powers as may be necessary or convenient to enable her or it to attend to all of the business of the trust estate in the most direct and efficient way without being required to apply to any court and without being unduly hampered

Exhibit "6"—(Continued)

by personal liability or unfavorable results of any action that such Trustee may take in good faith and in the exercise of reasonable judgment and care.

The following is a description of the said residue of which distribution is hereby decreed unto said Trustee:

Cash in the sum of \$33,875.34.

Claim for refund on account of overpayment by executrix of 1951 estate Federal income tax, \$2,159.49.

Claim for refund on account of overpayment by executrix of 1951 estate California income tax, \$104.58.

Securities:

200 shares General Motors Corporation, common stock, \$10 par value.

300 shares American Telephone & Telegraph Co., capital stock, no par value.

1150 shares California Packing Corporation, common stock, no par value.

50 shares Continental Can Company, Inc., common stock, no par value.

100 shares General Electric Company, common stock, no par value.

100 shares Illinois Power Company, common stock, no par value.

100 shares National Biscuit Company, common stock, no par value.

315 shares National Lead Company, common stock, no par value.

Exhibit "6"—(Continued)

200 shares Pacific Gas & Electric Company, 6% 1st preferred stock, no par value.

300 shares Pacific Gas & Electric Company, common stock, no par value.

50 shares Pacific Power & Light Company 5% preferred stock, no par value.

130 shares Pacific Telephone & Telegraph Company, common stock, \$100 par value.

50 shares Pacific Telephone & Telegraph Company, preferred stock, \$100 par value.

242 shares Richfield Oil Corporation, common stock, no par value.

130 shares Shell Union Oil Corporation, common stock, no par value.

175 shares Southern California Edison Company, 4.32% Series, cumulative preferred stock, \$25 par value.

175 shares Southern California Edison Company, 4.48% Series, cumulative preferred stock.

564 shares Standard Oil Company of California, capital stock, no par value.

100 shares The Chase National Bank, capital stock, no par value.

150 shares United States Steel Corporation, common capital stock, no par value.

\$5,000 m.v. United States Savings Bonds, Series E issued August, 1943.

\$10,000 m.v. United States Savings Bonds, Series E issued September, 1944.

\$5,000 m.v. United States Savings Bonds, Series E issued August, 1946.

Exhibit "6"—(Continued)

\$10,000 m.v. United States Savings Bonds, Series E issued November, 1947.

Real Estate:

All that certain real property situate in the City of Sacramento, County of Sacramento, State of California, and described as follows:

The West 50 feet of Lot Eight (8) in the block or square bounded by G and H and Sixteenth and Seventeenth Streets, according to the official survey of said City of Sacramento, State of California, as per map or plan thereof on file in the office of the County Recorder of said Sacramento County.

The West half of Lot Four (4) and all of Lots Five (5) and Six (6) in the block or square bounded by G and H and Fifteenth and Sixteenth Streets, according to the official survey of the said City of Sacramento, State of California, as per map or plan thereof on file in the office of the County Recorder of said Sacramento County.

The North $37\frac{1}{2}$ feet of the South 60 feet of Lot One (1) in the block or square bounded by I and J and Fourth and Fifth Streets, according to the official survey of the said City of Sacramento, State of California, as per map or plan thereof on file in the office of the County Recorder of said Sacramento County.

The North 40 feet of Lot One (1) in the block or square bounded by M and N and Fourth and Fifth Streets, and the South 20 feet of the North 60 feet of said Lot One (1) in said block and square,

Exhibit "6"—(Continued)

according to the official survey of the said City of Sacramento, State of California, as per map or plan thereof on file in the office of the County Recorder of said Sacramento County.

The North 20 feet of the West 60 feet of the South 80 feet of Lot One (1) in the block bounded by and between I and J, Fourth and Fifth Streets, as per the official map or plat thereof on file in the office of the County Recorder of the County of Sacramento, State of California.

The East half of Lot 7 in the block bounded by K and L, Thirteenth and Fourteenth Streets of the City of Sacramento, according to the official map or plan of said City.

The West $\frac{1}{2}$ of Lot Six in the block bounded by Thirteenth and Fourteenth and K and L Streets of the City of Sacramento, according to the official plat thereof.

Done in open Court this 23rd day of July, 1953.

T. I. Fitzpatrick,
Judge of the Superior Court.

Certification of Copy Attached.

[Endorsed]: Filed August 4, 1953.

EXHIBIT "7"

U. S. Treasury Department
Internal Revenue Service
District Director
100 McAllister Street
San Francisco 2, California

In replying refer to: Jan. 24, 1955

Chief, Audit Division

A:R:30D: Room 1403A

Estate of Mary T. Lykins, Deceased

Elizabeth G. Williams, Executrix

c/o Heller, Ehrman, White & McAuliffe

14 Montgomery Street,

San Francisco 4, California

Report Dated: December 2, 1954. Year(s): 1951.

Dear Madam:

There is enclosed for your information and files a copy of a report covering the examination of your income tax return(s) for the year(s) indicated, recently made by a representative of this office. You have indicated your agreement to the adjustment of tax liability shown in the report.

The item checked below explains briefly how settlement of the agreed tax liability will be accomplished through the office of the District Director of Internal Revenue for your district.

Very truly yours,

Glen T. Jamison,

District Director,

By

Chief, Audit Division.

Exhibit "7"—(Continued)

Enclosure.

[] Deficiency: The District Director will present to you at an early date a bill for payment of the tax, together with interest, at which time remittance should be made to that official, provided you have not already paid the full amount due.

[] Net Deficiency: After the overassessment(s) have been processed by the District Director, you will be presented with a bill for the amount due, at which time remittance should be made to the District Director.

[] Net Overassessment: After the overassessment(s) have been processed by the District Director, you will be advised as to how the overassessments have been applied, and will receive a check for the amount due you.

[X] Overassessment: After the overassessment(s) have been processed by the District Director, you will receive a check in payment of the overassessment and interest, provided there are no outstanding taxes against which the amount should be credited.

Schedule No. 1

Adjustments to Income

1. Net income on return.....	\$8,711.42
5. Nontaxable income and additional deductions:	
(5-a) Income set aside	
for charity	\$8,711.42
6. Total deductions from income.....	\$8,711.42
9. Corrected net income.....	None

Exhibit "7"—(Continued)

Agreement form 870 has been secured and is attached to return for year ended December 31, 1951.

Remarks: Careful consideration has been given to the claim for refund filed on May 12, 1953 in the amount of \$2,159.49. The overassessment recommended herein represents an allowance of the claim in full.

Schedule No. 2

Report of Income Tax Audit Changes for Year 1951

Field Audit. District: San Francisco. Account No. 355601.

Tax Computation Where Tax Table Not Used	
Corrected net income	None
Income subject to tax.....	None

Single or Separate Return

Taxable income	None
Corrected tax	None

Corrected tax	None
Less: Tax liability disclosed by return....	\$2,158.18

Overassessment	\$2,158.18
Computation of Additional Tax or Overassessment	
Corrected tax liability	None
Less: Previous assessment.....	\$2,158.18

Overassessment	\$2,158.18
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[Endorsed]: Plaintiff's Exhibit No. 1 Filed January 2, 1957.

[Title of District Court and Cause.]

MEMORANDUM AND ORDER FOR
JUDGMENT

Goodman, District Judge.

This is an action for the refund of income taxes allegedly erroneously assessed and collected from the Estate of Preston L. Lykins of which plaintiff is the executrix. The cause has been submitted upon stipulated facts. The sole issue is whether or not the estate is entitled, under the provisions of Section 162(a) of the Internal Revenue Code of 1939, to deduct from its gross income for 1951 certain income which was ultimately destined to be received by charitable organizations.

On December 21, 1950, Preston Lykins and his wife Mary T. Lykins executed reciprocal wills. Preston's will gave his entire estate to Mary and provided that, in the event she predeceased him, certain designated beneficiaries should receive specific bequests and devises and the remainder of his property should be held in trust for the benefit of certain charitable organizations. Mary's will gave her entire estate to Preston and contained the same provisions for specific bequests and devises and a residual charitable trust, to be operative in the event he predeceased her. Both wills provided that no legatee or devisee should be entitled to interest or income during the period of administration.

Preston Lykins died on January 8, 1951. His wife, Mary, died nine months later on September 18, 1951, while his estate was still in probate. Un-

der the terms of Preston's will, his entire estate went to Mary. The charitable provisions of his will did not become operative. Upon Mary's death, the right to receive all of the property of Preston's estate became vested in her estate. Since her will provided that none of the income from her estate during the period of administration should accrue to any devisee or legatee, such of the income received during that period as was not expended to pay taxes and the cost of administration ultimately would go to the residual charitable trust. Thus, plaintiff contends that upon Mary's death, all of the future income of Preston's estate became irrevocably committed to the charitable trust established by Mary's will, and, under the provisions of Section 162(a) of the Internal Revenue Code of 1939, was not taxable income. She urges that the Commissioner erred in disallowing a deduction from the gross estate income for 1951 of the income received after September 18, 1951, the date of Mary's death.

Section 162(a) of the Internal Revenue Code of 1939 provided that:

“The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual except that—

(a) Subject to the provisions of subsection (g), there shall be allowed as a deduction (in lieu of the deduction for charitable, etc., contributions authorized by section 23(o)) any part of the gross income, without limitation, which pursuant to the terms of the will or deed creating the trust, is dur-

ing the taxable year paid or permanently set aside for the purposes and in the manner specified in section 23(o) or is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, or for the establishment, acquisition, maintenance or operations of a public cemetery not operated for profit.”

The language of Section 162(a) conditions the charitable deduction upon the commitment of income to charitable purposes by the will of the decedent. It is not necessary that the will definitely direct the charitable contributions claimed as deductions if the contributions are actually made during the taxable years as a consequence of discretionary authority granted by the will. *Old Colony Trust Co. v. Commissioner*, 301 U.S. 378 (1937).¹ But, the statute plainly contemplates that the contribution must be the result of a charitable intent expressed in the will.

Plaintiff cites no authority supporting her position that the deduction is allowable even though the commitment of the income to charitable purposes during the taxable year results from circumstances entirely extraneous to the decedent's will. Plaintiff urges that the purpose of the statute is to encourage gifts for charitable purposes, *Old Colony Trust Co. v. Commissioner*, *supra*, and that the certainty that income will eventually go to the charity is, in

¹ This case was decided in reference to Section 162(2) of the Revenue Act of 1928, 45 Stat. 838, but its language is identical to the language of Section 162(a) of the Internal Revenue Code of 1939.

itself, sufficient to justify the statutory deduction. But here the commitment of the income from Preston's estate to charity did not result from any statutory encouragement given him to make a charitable bequest. He willed his entire estate to his wife. The allowance of the claimed deduction would not be in furtherance of the statutory purpose.

Judgment will enter for defendant upon Findings presented pursuant to the Rules.

Dated: March 28, 1957.

/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed March 28, 1957.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled action came on regularly for trial on January 2, 1957 before the Court sitting without a jury, Honorable Louis E. Goodman, United States District Judge, presiding. Robert C. Harris, Esq. and Charles A. Wood, Jr., Esq. appeared for plaintiff, and Lloyd H. Burke, Esq., United States Attorney, by Lynn J. Gillard, Esq., Assistant United States Attorney, appeared for defendant. The matter was submitted for decision upon a stipulation of facts and briefs since filed. From the evidence the Court makes the following

Findings of Fact

1. The above entitled action was brought by plaintiff to recover federal income taxes paid for the calendar year 1951.

2. The facts set forth in the stipulation of facts filed by the parties herein are true.

3. Preston L. Lykins died on January 8, 1951 and his wife Mary T. Lykins died on September 18, 1951. Under the terms of his will, his entire estate was left to his wife and the charitable provisions of his will did not become operative.

4. Preston L. Lykins did not, nor was it his intent to, leave any of his estate for charitable or religious purposes, and none of his estate, during the calendar year 1951, was paid, permanently set aside or used for religious or charitable purposes.

On the basis of the foregoing findings of fact the Court makes the following

Conclusions of Law

1. Section 162(a) of the Internal Revenue Code of 1939 conditions the charitable deductions upon the commitment of income to charitable purposes by the will of the decedent.

2. Defendant is entitled to judgment herein that plaintiff recover nothing, and dismissing the complaint.

Dated: April 24, 1957.

/s/ LOUIS E. GOODMAN,

United States District Judge.

Approved as to form:

Dated: April 15, 1957.

HELLER, EHRMAN, WHITE &
McAULIFFE,
Attorneys for Plaintiff.

[Endorsed]: Filed April 24, 1957.

In the United States District Court, Northern
District of California, Southern Division

Civil No. 35699

ELIZABETH G. WILLIAMS, EXECUTRIX,
ESTATE OF PRESTON L. LYKINS, DE-
CEASED, Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

JUDGMENT

The above entitled action came on regularly for trial on January 2, 1957 before the Court sitting without a jury, Honorable Louis E. Goodman, United States District Judge, presiding. Robert C. Harris, Esq. and Charles A. Wood, Jr., Esq. appeared for plaintiff, and Lloyd H. Burke, Esq., United States Attorney, by Lynn J. Gillard, Esq., Assistant United States Attorney, appeared for defendant. Evidence having been introduced and the cause submitted for decision upon briefs, and the Court having made its findings of fact and conclusions of law,

Now therefore, by reason of the law and the evidence and the findings of fact and conclusions of law aforesaid,

It Is Hereby Ordered, Adjudged and Decreed that plaintiff's complaint and cause of action therein be, and the same are, hereby dismissed.

Dated: April 24th, 1957.

/s/ LOUIS E. GOODMAN,
United States District Judge.

Approved as to form:

Dated: April 15, 1957.

HELLER, EHRMAN, WHITE &
McAULIFFE,
Attorneys for Plaintiff.

Entered in Civil Docket April 24, 1957.

[Endorsed]: Filed April 24, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Elizabeth G. Williams, Executrix of the Estate of Preston L. Lykins, deceased, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth

Circuit from the final judgment entered in this action on the 24th day of April, 1957.

Dated: May 7, 1957.

MARTIN MINNEY,
ROBERT C. HARRIS,
CHARLES A. WOOD, JR.,
HELLER, EHRMAN, WHITE &
McAULIFFE,

/s/ By CHARLES A. WOOD, JR.,
Attorneys for Appellant.

[Endorsed]: Filed May 7, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this court in the above-entitled case and constitute the record on appeal herein as designated by attorneys for the appellant, except the Reporter's Transcript of Trial Proceedings is not included, for the reason it has not been received by this office for filing:

Excerpt from Docket Entries.

Complaint with Exhibits and Statement of Financial Transactions.

Answer of Defendant.

Interrogatories by Defendant to Plaintiff.

Answer of Plaintiff to Interrogatories.

Memorandum Order for Judgment.

Findings of Fact and Conclusions of Law.

Judgment.

Notice of Appeal.

Appeal Bond.

Appellant's Designation of Record on Appeal.

Plaintiff's Exhibit 1.

In Witness Whereof I have hereunto set my hand and affixed the seal of said District Court this 17th day of June, 1957.

[Seal] C. W. CALBREATH,
Clerk,

/s/ By MARGARET P. BLAIR,
Deputy Clerk.

[Endorsed]: No. 15586. United States Court of Appeals for the Ninth Circuit. Elizabeth G. Williams, Executrix, Estate of Preston L. Lykins, deceased, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: June 17, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
Ninth Circuit

No. 15586

ELIZABETH G. WILLIAMS, EXECUTRIX,
ESTATE OF PRESTON L. LYKINS, DE-
CEASED, Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

STATEMENT OF POINTS ON WHICH
APPELLANT INTENDS TO RELY

Elizabeth G. Williams, Executrix, Estate of Preston L. Lykins, deceased, appellant herein, states that the points on which appellant intends to rely on this appeal are as follows:

1. The District Court erred in finding that appellant-estate is not entitled, under the provisions of Section 162(a) of the Internal Revenue Code of 1939, to deduct from its gross income for 1951 certain income which was ultimately destined to be received by charitable organizations.

2. The District Court erred in finding that it was not the intent of Preston L. Lykins to leave any of his estate for charitable or religious purposes.

3. The District Court erred in finding that none of appellant-estate, during the calendar year 1951, was paid, permanently set aside or used for religious or charitable purposes.

4. The District Court erred in failing to find that appellant-estate's income was committed to charitable purposes so as to be deductible from its gross income for the year 1951, pursuant to the provisions of Section 162(a) of the Internal Revenue Code of 1939.

5. The District Court erred in failing to find that the will of the decedent's wife, Mary, was in fact an assignment of a portion of appellant-estate's income to charitable purposes.

6. The District Court erred in failing to find that upon the death of the decedent's wife, Mary, the sole beneficiary of appellant-estate became a charity instead of an individual.

7. The District Court erred in failing to find that upon the death of the decedent's wife, Mary, appellant-estate, including the income therefrom, became a mere asset of the decedent's wife's estate, thereby becoming committed to charitable purposes, pursuant to the terms of the will of the decedent's wife.

8. The District Court erred in granting judgment for appellee and in failing to grant judgment for appellant in the amount prayed for.

Dated: San Francisco, California, June 27, 1957.

Respectfully submitted,

MARTIN MINNEY,
ROBERT C. HARRIS,
CHARLES A. WOOD, JR.,

HELLER, EHRMAN, WHITE &
McAULIFFE,

/s/ By CHARLES A. WOOD, JR.,
Attorneys for Appellant.

Acknowledgment of Service Attached.

[Endorsed]: Filed July 1, 1957. Paul P. O'Brien,
Clerk.

[Title of Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF PARTS
OF RECORD TO BE PRINTED

Appellant designates the following portions of
the record and requests that the Clerk print the
same:

1. Plaintiff's Complaint, including Exhibits A
and B attached thereto.

2. Defendant's Answer.

3. Plaintiff's Exhibit 1, entitled "Stipulation of
Facts", including the following exhibits attached
thereto:

a) Exhibit 1, consisting of 14 pages, Will of
Preston L. Lykins.

b) Exhibit 2, consisting of 14 pages, Will of
Mary T. Lykins.

c) Exhibit 4, consisting of 9 pages, Decree of
Settlement of First and Final Account and of Final
Distribution in the Matter of the Estate of Preston
L. Lykins, deceased.

d) Exhibit 6, consisting of 15 pages, Decree of Settlement of First and Final Account and of Final Distribution in the Matter of the Estate of Mary T. Lykins, deceased.

e) Exhibit 7, Revenue Agent's Report.

4. Memorandum Order for Judgment.

5. Findings of Fact and Conclusions of Law.

6. Judgment.

7. Notice of Appeal.

8. Appellant's Designation of Record on Appeal.

9. Statement of Points on Which Appellant Intends to Rely.

10. This Designation of Parts of Record to Be Printed.

Dated: San Francisco, California, June 27, 1957.

Respectfully submitted,

MARTIN MINNEY,
ROBERT C. HARRIS,
CHARLES A. WOOD, JR.,
HELLER, EHRMAN, WHITE &
McAULIFFE,

/s/ By CHARLES A. WOOD, JR.,
Attorneys for Appellant.

Acknowledgment of Service Attached.

[Endorsed]: Filed July 1, 1957. Paul P. O'Brien,
Clerk.



No. 15,586

IN THE

**United States Court of Appeals
For the Ninth Circuit**

ELIZABETH G. WILLIAMS, Executrix of the
Estate of Preston L. Lykins, Deceased,
Appellant,

VS.

UNITED STATES OF AMERICA,
Appellee.

**On Appeal from the Judgment of the United States District
Court for the Northern District of California.**

REPLY BRIEF FOR APPELLANT.

ROBERT C. HARRIS,

JULIAN N. STERN,

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Attorneys for Appellant.

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No. 15,586

IN THE

**United States Court of Appeals
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ELIZABETH G. WILLIAMS, Executrix of the
Estate of Preston L. Lykins, Deceased,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

**On Appeal from the Judgment of the United States District
Court for the Northern District of California.**

REPLY BRIEF FOR APPELLANT.

ARGUMENT.

In its Brief Appellee takes the position that Section 162 of the Internal Revenue Code of 1939 sets forth three requirements for deductibility, and that these requirements are not satisfied in this case. In presenting its argument Appellee indulges in certain legal and factual misconceptions to which Appellant respectfully calls this Court's attention.

I.

Appellee views this case as being simply a bequest of Preston's estate to his wife, Mary, and contends that

Mary's subsequent death and the creation of a charitable residue from her estate are factors "extraneous" to the will of the decedent which should not be considered. But Appellee merely states this conclusion without stating reasons therefor. No attempt is made to answer Appellant's argument that the impact of later events upon the will or provisions of a trust, can and do change the tax consequences of the income of an estate or trust. In other words, Appellee does not answer Appellant's contention that a change in the taxable status of the recipient of Preston's estate is relevant to whether or not the income of Preston's estate is permanently set aside for charity. While the change occurred outside of Preston's will, nevertheless the charity became entitled to the corpus and income of Preston's estate because of the initial disposition in Preston's will. Preston's will is the first step in the chain of causation which leads to receipt by the charity as such. The income is set aside "pursuant to", i.e. "in consequence of", "conformable", "following", Preston's will. (Cf. *Old Colony Trust Co. v. Commissioner*, 301 U.S. 379, 383 (1937)).

II.

Appellee admits that the income of Preston's estate, subsequent to the death of Mary, was permanently set aside for charity. (Brief for Appellee, p. 9.) Appellee argues, however, that the setting aside was not "pursuant to the terms of the will".

This statutory requirement simply denies the particular charitable deduction where a trustee or executor has any election or choice as to whether or not any income should be given to charity. The purpose of the statutory pro-

vision is merely to condition the charitable deduction on the certainty of the ultimate destination of the income before its receipt. In this case, at the moment of Mary's death there was no discretion in any person acting in any capacity whatsoever as to whether charity would receive the corpus and income from Preston's estate. The charitable destination was clear and the purpose of the statutory provision was satisfied.

Appellee's citation of *Falk v. Commissioner*, 189 F. 2d 806 (3rd Cir. 1951), cert. den. 342 U.S. 861 (1951), in which the trustee had broad discretion to decide whether any charity should receive any trust income, rather than limited discretion to choose a particular charity overlooks this distinction which is readily revealed by comparing *Old Colony Trust Co. v. Commissioner*, 301 U.S. 379 (1937), with the *Falk* case. This distinction would appear similar to the dichotomy in result between those cases involving the assignment of corpus which produces income and the mere assignment of the income. Compare *Commissioner v. Blair*, 300 U.S. 5 (1937), with *Harrison v. Schaffner*, 312 U.S. 579 (1941).

III.

Appellant does not interpret the statutory requirement that income be permanently set aside "pursuant to the terms of the will or deed creating the trust" as constituting an implacable barrier to the charitable deduction in question. Neither do we agree with Appellee's apparent belief that it is necessary that the charitable trust be set up directly by the decedent's will. "Pursuant to" is a phrase capable of broad definition, which, according to the Supreme Court, does not mean "directed or definitely

enjoined.” See *Old Colony Trust Co. v. Commissioner*, 301 U.S. 379, 383 (1937). The statutory requirement would appear satisfied if Preston’s will is an essential link in the chain by which the charity becomes entitled to Preston’s corpus and the income therefrom. And it can hardly be argued that Preston’s will was not the primary link in the chain of causation, with Mary’s estate being merely a conduit to the ultimate charitable recipient. The fact that Mary’s estate is interposed between Preston’s will and the charities should not defeat the charitable deduction. This interposition of Mary’s estate is no different from the interposition of a testamentary trust between an estate in administration and distribution of income to charity.

Moreover, the inexact words of the statute do not specify any particular trust or any particular will creating the trust. The inexactitude of the statutory language is made clear by the fact that a technically literal construction would deny the charitable deduction in any case in which a charitable trust has not been set up during the year in question, since the phrase on which Appellee relies is stated in terms of the creation of a trust. Needless to say, early attempts of the Treasury Department at so technical a construction of the statutory language were not successful. In fact, the charitable deduction is even allowed to an estate in the process of administration, though a trust will never be set up. *Bowers v. Slocum*, 20 F. 2d 350, 352 (2d Cir. 1927).

In any case, all that would appear necessary is that there be a trust, by the terms of which it is definite that income will ultimately be received by a charity. The

charitable trust set up under Mary's will, by which the subsequent income from Preston's estate was clearly destined for charity, satisfies this requirement.

IV.

Finally, Appellee falls back on the contention that there was no income in Preston's estate to be set aside for charity. Possibly, Appellee is not too confident that this Court will permit a narrowly technical construction of an inexact statute to defeat a charitable deduction which conforms to the spirit of Congressional regard for charitable beneficence. Otherwise, there would appear to be no warrant for Appellee's ultimate reliance upon an argument which is contrary not only to the facts in this case, but also to California law and the position taken by Appellee in cases involving similar issues.

Appellee has apparently overlooked the facts in this case when it states that Appellant has not shown that Preston's estate had income for the calendar year 1951 in excess of administration expenses. The Stipulation of Facts contains a copy of the fiduciary income tax return for Preston's estate for the period in controversy which discloses net income in the amount of \$33,257.04. The Stipulation of Facts also contains the first and final account for Preston's estate which discloses disbursements for the year 1951 in the sum of \$3,268.74.

Furthermore, Appellee bases its legal conclusion that there was no income in Preston's estate which could be set aside for charity on the assumption that expenses incurred in administering Preston's estate were chargeable to income. Appellee's assumption is clearly erroneous. Under

California law, in the absence of a contrary direction in the will, expenses of administration are chargeable against the corpus of an estate rather than against the income thereof. Appellee must be aware of this rule because the Commissioner of Internal Revenue correctly contended in connection with an estate probated under the laws of the State of California that the widow's allowance, which is an ordinary expense of administration,¹ was a charge against the corpus of the estate and not against the income. Thus, in *Caroline T. Carson*, 8 T.C.M. 1100 (1949), the Tax Court cited Sections 300, 680, and 750 of the Probate Code of the State of California,² dealing with expenses of administration and agreed with the Commissioner's contention that the family allowance is an expense of administration and "is a charge against the corpus of the estate" (8 T.C.M. at 1102).³ See also *Title Insurance and Trust Co.*, 25 B.T.A. 805 (1932). Cf. *Slocum v. Bowers*, 15 F. 2d 401, 404, aff'd 20 F. 2d 350 (2d Cir. 1927).

¹*Estate of Cutting*, 174 Cal. 104, 109 (1916).

²The Tax Court also cited *Re Wever's Estate*, 12 Cal. App. 2d 237 (1936); *In re Haselbud's Estate*, 26 Cal. App. 2d 375 (1938); and *In re King's Estate*, 19 Cal. 2d 354 (1942).

³If Preston's will had directed that administration expenses be charged to income, they would have been so charged, pursuant to Section 750 of the Probate Code of the State of California. Such a provision appeared in the instruments involved in the cases cited by the Government as authority for its position. *Bank of America National Trust and Sav. Assn. v. Commissioner*, 126 F. 2d 48 (9th Cir. 1942); *Boston Safe Deposit & T. Co. v. Commissioner*, 66 F. 2d 179 (1st Cir. 1933). Preston's will, however, left his entire estate to Mary, with no provision for the payment of administration expenses. As a result, the general rule in California that expenses of administration are chargeable to corpus applies to the estate at bar.

Appellee's argument is likewise inconsistent with the position it takes with respect to the computation of a charitable remainder for estate tax purposes. In such cases Appellee requires that the deduction for the charitable gift be reduced by expenses of administration on the theory that such expenses are charges against the corpus of the estate thereby reducing the amount of corpus available or passing to the charity.

CONCLUSION.

Appellee's brief in answer would appear to contain no compelling argument for affirming the District Court's decision. Accordingly, for the reasons stated in Appellant's opening brief, it is respectfully submitted that Congress' design "to forego some possible revenue in order to promote aid to charity" (*Old Colony Trust Co. v. Commissioner*, 301 U.S. 379, 384 (1937)), should not be here defeated by an unduly narrow construction of a broad relief provision.

Dated, San Francisco, California,

December 17, 1957.

ROBERT C. HARRIS,

JULIAN N. STERN,

CHARLES A. WOOD, JR.,

HELLER, EHRMAN, WHITE & MCAULIFFE,

Attorneys for Appellant.

No. 15,586

IN THE

United States Court of Appeals
For the Ninth Circuit

ELIZABETH G. WILLIAMS, Executrix, Estate
of Preston L. Lykins, Deceased,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the Judgment of the United States District
Court for the Northern District of California.

BRIEF FOR THE APPELLEE.

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PAUL P. GILLEN, CLERK

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No. 15,586

IN THE

**United States Court of Appeals
For the Ninth Circuit**

ELIZABETH G. WILLIAMS, Executrix, Estate
of Preston L. Lykins, Deceased,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

**On Appeal from the Judgment of the United States District
Court for the Northern District of California.**

BRIEF FOR THE APPELLEE.

OPINION BELOW.

The memorandum and order for judgment together with the findings of fact and conclusions of law of the Court below (R. 91-97) have not yet been officially reported.

JURISDICTION.

This appeal involves federal income taxes. The taxes in dispute were paid as follows: \$3,307 on March 4, 1952; \$11,842.70 on June 13, 1952; and \$1,248.24 on or about November 25, 1955. (R. 14.)

Claim for refund in the amount of \$7,019.39 was filed on or about May 12, 1953 (R. 7-9, 14-15), and was rejected on or about December 28, 1955 (R. 10-11, 15.) Within the time provided in Section 3772 of the Internal Revenue Code of 1939 and on July 23, 1956, the taxpayer brought an action in the District Court for recovery of the taxes paid. (R. 3-11.) Jurisdiction was conferred on the District Court by 28 U.S.C., Section 1346. The judgment was entered on April 24, 1957. (R. 96-97.) Within sixty days and on May 7, 1957, notice of appeal was filed. (R. 97-98.) Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

QUESTION PRESENTED.

Whether the estate is entitled to a charitable deduction under Section 162(a) of the Internal Revenue Code of 1939 for asserted income payments to charity "pursuant to the terms of the will" of decedent where the decedent's will left all his property to his wife and she upon her death left some of her property to charities?

STATUTE INVOLVED.

Internal Revenue Code of 1939:

Sec. 162 [as amended by Sec. 321 (b), Revenue Act of 1950, c. 994, 64 Stat. 906]. Net Income.

The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—

(a) Subject to the provisions of subsection (g), there shall be allowed as a deduction (in lieu of the deduction for charitable, etc., contributions authorized by section 23(o)) any part of the gross income, without limitation, which pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in section 23(o), or is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, or for the establishment, acquisition, maintenance or operation of a public cemetery not operated for profit; * * *

(26 U.S.C. 1952 ed., Sec. 162.)

STATEMENT.

This case was submitted upon the pleadings and a stipulation of facts. (R. 94.) The facts are as follows:

The appellant, Elizabeth G. Williams, hereafter referred to as the taxpayer, is the duly appointed executrix of the estate of Preston L. Lykins, deceased. (R. 14.) The decedent died testate on January 8, 1951, and was survived by his wife, Mary T. Lykins. (R. 16.)

The decedent and his wife, on December 21, 1950, executed reciprocal wills. Decedent's will (R. 18-35) provided that his entire estate was to go to his wife should she survive him. (R. 19, 91.) In the event that she predeceased him, certain beneficiaries were

to receive specific bequests and devises (R. 20-24, 91) and the remainder of the property was to be held in trust for the benefit of various charitable organizations. (R. 24-27, 91.) The wife's will (R. 35-52) gave her entire estate to decedent (R. 37, 91) and in the event of his predeceasing her contained the same provisions for specific bequests and devises (R. 38-41, 91) and the same residual charitable trust. (R. 42-44, 91.)

On September 18, 1951, approximately nine months after the decedent's death, and while his estate was still in probate, the wife died. (R. 16, 91.)

The taxpayer filed a fiduciary income tax return for the period beginning with the date of decedent's death on January 8, 1951, and ending on December 31, 1951, and paid the tax there shown to be due together with the amount of an additional assessment for the same period. (R. 4, 12.) Subsequently, a claim for refund was filed in which it was contended that the taxpayer had erroneously included in the gross income of decedent's estate the income received by the estate after the date of the wife's death. Such income, it was contended, was exempt from taxation because it was set aside for charitable purposes. (R. 5, 7-9.)

In the fiduciary return filed the taxpayer reported as net income for 1951 the amount of \$33,257.04. (R. 9.) Some of the payments made by the taxpayer during administration of the estate are as follows: Federal tax payments, \$15,156.91 (R. 9); closing expenses allowed the taxpayer, \$500 (R. 58); statutory compen-

sation to taxpayer as executrix, \$4,972.40 (R. 58-59); statutory attorneys' fees, \$4,972.40. (R. 59.) The amount of California inheritance taxes paid (R. 55) is not shown.

The District Court refused to allow the charitable deduction (R. 91-96) and entered judgment for the United States. (R. 96-97.) From this decision the taxpayer here appeals. (R. 97-98.)

SUMMARY OF ARGUMENT.

The decedent left all his property to his wife, and she, upon her death nine months later, left the residue of her estate to charities. Since the decedent left everything to his wife, he could not have left anything to charity and his estate is not entitled to the charitable deduction allowed by Section 162 of the Internal Revenue Code of 1939. That section sets forth three specific requirements which must be fulfilled before the deduction may be allowed: (1) The amount paid or set aside must come from the gross income of the estate; (2) the payment or setting aside must be pursuant to the terms of decedent's will creating the trust; and (3) the amount must be used exclusively for charitable, etc., purposes. These requirements are not met in the case at bar. Any payments that might have been made to charity were made pursuant to the will of the *wife*, and not the will of the decedent. The taxpayer's whole case relies upon factors completely extraneous to the will of the decedent: the death of his wife and her testamentary

bequest to charities. And these factors can be of no tax significance to the estate of the decedent so far as the Section 162(a) deduction is concerned in view of the precise requirement of that section that the amounts paid or set aside to charity must be pursuant to the terms of decedent's will. This decedent made no gifts to charity for the income of his estate.

Moreover, the claimed deduction could not be allowed even if taxpayer's primary argument were acceptable. The deduction under Section 162(a) is for income which is set aside for charity during the taxable year. Taxpayer has not shown that the decedent's estate had income in excess of administration expenses for 1951 and, accordingly, has not even shown that the wife's will operated during the taxable year to set aside income of the decedent's estate for charity.

ARGUMENT.

THE DECEDENT'S ESTATE IS NOT ENTITLED TO A CHARITABLE DEDUCTION UNDER SECTION 162(a) OF THE INTERNAL REVENUE CODE OF 1939.

The decedent herein died on January 8, 1951, and his death was followed about nine months later by the death of his wife. (R. 16.) Since the wife survived decedent, his estate was left in accordance with the provisions of Article V of his will. This article provides (R. 19) that:

I give, devise and bequeath all of my property and estate, both real and personal, and wherever situated, to my said wife, Mary T. Lykins, if she shall survive me.

In compliance with the terms of decedent's will, the taxpayer, his executrix, distributed his entire net estate to the executrix of the estate of his wife. (R. 57.) The provisions which the decedent had made for a charitable trust of the residue of his estate in the event that his wife predeceased him never became operative. Because the decedent left everything to his wife he could not have left anything to charity. His estate, consequently, is not entitled to the charitable deduction allowed by Section 162, *supra*, which provides in pertinent part as follows:

Sec. 162. Net Income.

The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—

(a) Subject to the provisions of subsection (g), there shall be allowed as a deduction (in lieu of the deduction for charitable, etc., contributions authorized by section 23(o)) any part of the gross income, without limitation, which pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in section 23(o), or is to be used exclusively for religious, charitable, scientific, literary, or educational purposes. * * *

Three specific requirements which must be fulfilled before the charitable deduction may be allowed are readily apparent from the section. First, the amount paid or set aside must come from the gross income of the estate; second, the payment or setting aside must be pursuant to the terms of decedent's will creat-

ing the trust; and third, the amount must be used exclusively for charitable, etc., purposes. Not a single one of these requirements is met in the case at bar. The decedent left his entire estate, income and corpus, to his wife. She was given a complete interest in such estate, and no interest at all from either the corpus or the income of the estate was paid or set aside for charitable purposes.

Taxpayer's sole argument in this case is based upon the facts that the will of the wife (not the decedent) left the residue of *her* estate to charities and that the decedent's estate made up part of the wife's estate. Taxpayer thus completely ignores the express requirement of the statute that the gift of the income to charities be made "pursuant to the terms of the will or deed creating the trust." The decedent made no gift at all to charities, he left all his property to his wife. The fact that she later died and left some of *her* property to charities is manifestly of no tax significance to the estate of the decedent. The taxpayer's whole case here relies upon factors completely extraneous to the will of the decedent.

The weakness of taxpayer's case is apparent when the situation is viewed as if the wife had not died. In such an instance, all of the income and corpus would go to the wife, just as here it falls into the wife's estate, and there would be no question at all as to the taxability of decedent's estate for the income received during the year in question. Suppose, for the purposes of illustration, that the wife made an *inter vivos* assignment to charities for her interest in the income

of decedent's estate. The only tax consequence that would result from such an assignment would concern the question of whether the wife herself was taxable on the income. This assignment, completely outside and extraneous to the will of the decedent, would have no effect whatsoever upon the tax affairs of the decedent's estate. The taxpayer, in setting forth this same situation, obliquely states (Br. 14) that "the income of Preston's estate subsequent to such assignment would then be permanently set aside for the charitable assignee." (Citations omitted.) This statement is probably true, but it certainly is not dispositive of the issue before this Court. The income is set aside permanently for the charitable assignee, but it is set aside by the wife, not by the decedent, and it has no effect upon the taxability of decedent's estate. None of these cases cited by taxpayer (*Commissioner v. Blair*, 300 U.S. 5; *Commissioner v. Clark*, 202 F. 2d 94 (C.A. 7th); *United States v. Pierce*, 137 F. 2d 428 (C.A. 8th); *Helvering v. Achelis*, 112 F. 2d 929 (C.A. 2d)) does more than consider whether or not the interest assigned is includible within the gross income of the assignor of the interest. In none of these cases was the taxability of the estate or trust considered, and none is dispositive of the issue here under consideration.

That the payment to charity must be made pursuant to the will of the decedent before the amounts may be deducted under Section 162(a) is clear from the precise terms of the section. The Supreme Court, in *Old Colony Co. v. Commissioner*, 301 U.S. 379, 383, stated that:

“Pursuant to” is defined as “acting or done in consequence or in prosecution (of anything); hence, agreeable; conformable; following; according.”

The words of the statute are plain and should be accorded their usual signifi- cance in the absence of some dominant reason to the contrary.

Fitting the present situation within the above definition, the only thing done “pursuant to the terms of the will” of the decedent was to distribute his assets to his wife. His will did not direct that any of his property or the income therefrom be given to charity.

The Third Circuit, in *Falk v. Commissioner*, 189 F. 2d 806, certiorari denied, 342 U.S. 861, decided that certain payments of trust income which were actually made to charities were includible in the gross income of the donor’s son where the trust instrument provided that out of the trust income a certain sum was to be paid to the daughter of the donor, a portion to such charities as the son might designate, and the balance to the son. Because the son was under no obligation at all to designate payment to any charities, the entire income actually designated was held includible in his gross income, since none of the payments were made pursuant to the trust instrument. The case at bar, where the will of the decedent makes no mention at all of disposing of his property to charity should his wife survive him, manifestly presents an even stronger case for holding that no payments were made to charity pursuant to the will.

The taxpayer is unable to cite any case where the charitable deduction has been allowed an estate merely because the beneficiary of the estate makes a gift to charity. In all of the cases cited, there has been some express provision for charity in the will or trust instrument itself, and the Courts have looked to the terms of the will or trust instrument in order to determine deductibility. One example of such a situation is found in *Arthur Jordan Foundation v. Commissioner*, 210 F. 2d 885 (C.A. 7th). In that case the trust instrument provided that all earnings were to go to charities. The question of deductibility of income received arose because of a provision in the trust instrument which provided for an accumulation of some of the net earnings. An indication of the all-encompassing importance of the trust instrument itself is contained in the following statement of the Court (pp. 887-888):

Under this provision [Section 162(a)] the trust may itself engage in functional charitable activities and deduct for such expenditures. * * * Whether or not claimed deductions will be allowed must be determined by reference to the terms of the instrument creating the trust. The test is the purpose for which the funds are to be used and those purposes must be ascertained from the directions given by the settlor.

And see *Merchants Bank v. Commissioner*, 320 U.S. 256; *Commissioner v. F. G. Bonfils Trust*, 115 F. 2d 788, 792 (C.A. 10th); *Bowers v. Slocum*, 20 F. 2d 350 (C.A. 2d). Reference to the will in the instant case makes it clear that all the funds are to be used by

the decedent's wife. She was not a charity and the funds paid to her estate are not deductible.

Moreover, the claimed deduction would not be allowable even if taxpayer's primary argument were acceptable. The income for which a deduction is allowed under Section 162(a) is only that which is permanently set aside for charity "during the taxable year." Here the taxable year is January 8, 1951 (the date of the decedent's death), to December 31, 1951, and taxpayer is claiming a deduction for income of the estate for the period from September 18, 1951 (the date of the wife's death), to December 31, 1951, on the theory that such income became payable to the estate of the wife and was set aside for charity under the wife's will. But taxpayer has not shown that the decedent's estate had income for that period in excess of administration expenses or that any such income became distributable to the wife's estate and was, under the wife's will, set aside for charity in 1951. The facts show that taxpayer expended on behalf of the estate substantial sums for taxes, debts, and expenses of administration. There is no indication that there was anything left of the income of the estate, much less income of the taxable year, to be distributed to the wife's estate and set aside for charitable purposes. See *Bank of America Nat. T. & Sav. Ass'n v. Commissioner*, 126 F. 2d 48 (C.A. 9th); *Boston Safe Deposit & T. Co. v. Commissioner*, 66 F. 2d 179 (C.A. 1st). A payment to charity of the corpus of the estate is not deductible (*Frank v. Commissioner*, 145 F. 2d 413 (C.A. 3d); *Wellman v. Welch*, 99 F. 2d 75 (C.A. 1st)) and no deduction can be allowed for in-

come whose use or destination is uncertain (*John Danz Charitable Tr. v. Commissioner*, 231 F. 2d 673, certiorari denied, 352 U.S. 828, rehearing denied, 353 U.S. 951; *Merchants Bank v. Commissioner*, *supra*; *Maloney v. Glover*, 171 F. 2d 870 (C.A. 9th), certiorari denied, 337 U.S. 917). In this connection it should also be noted that the wife's will contained a provision (see R. 50-51) to the effect that it was her wish and intention that the right of the charitable beneficiaries to receive income "shall in no event accrue * * * until after the date of distribution to the trustee of the property constituting the trust estate [1953, after the taxable year], and not from the date of my death."

CONCLUSION.

The decision of the District Court in favor of the United States was correct and should be affirmed.

Respectfully submitted,

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October, 1957.



No. 15588 ✓

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CHARLES W. HOFFRITZ,

Petitioner,

vs.

THE HONORABLE HARRY C. WESTOVER and THE HONORABLE
WILLIAM MATHES, Judges of the United States District Court for the
Southern District of California, Central Division; and THE UNITED
STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT
OF CALIFORNIA, CENTRAL DIVISION,

Respondents.

Response of Respondent Court and Judges to Petition
for Writ of Mandamus, Injunction, and Other
Appropriate Relief, and for Rule to Show Cause
and Brief.

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IN THE

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vs.

THE HONORABLE HARRY C. WESTOVER and THE HONORABLE WILLIAM MATHES, Judges of the United States District Court for the Southern District of California, Central Division; and THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION,

Respondents.

**Response of Respondent Court and Judges to Petition
for Writ of Mandamus, Injunction, and Other
Appropriate Relief, and for Rule to Show Cause.**

(1) I, William C. Mathes, a Judge of the United States District Court for the Southern District of California, on behalf of the United States District Court for the Southern District of California, and on behalf of myself as a Judge thereof, in compliance with the rule here issued out of this Court on the 19th day of June, 1957, directing me and the Honorable Harry C. Westover, and the United States District Court for the Southern District of California, Central Division, to show cause

why the writ of mandamus, injunction, and other appropriate relief should not be granted in accordance with the prayer of the petition filed herein, do hereby certify and make the following response to this Court.

(2) The writ of mandamus, injunction, and other appropriate relief sought by the petition herein should be denied because of the facts disclosed by the record in this case and for the facts and reasons hereinafter set forth:

(3) Respondent has fully and completely complied with the mandate of this court, as referred to in the petition on file herein, as he understands and interprets such mandate, namely, the mandate filed, docketed and entered in the United States District Court for the Southern District of California, Central Division, on January 29, 1957, which mandate incorporates and directs, in conformity with the opinion of this Court, namely, the case of *Charles W. Hoffritz v. United States of America, et al.*, as reported in 240 F. 2d 109 (C. A. 9), December 20, 1956, and which opinion and mandate contains the following order to wit:

“The judgment is reversed and the cause remanded, with directions to grant appellant a hearing at which he may produce evidence and cross-examine adverse witnesses. An appropriate order shall be entered in the district court enjoining further proceedings in the criminal action until such a hearing has been held in the instant proceedings, and there has been a complete disposition thereof.”

(4) Your respondent respectfully submits that the language of such mandate enjoined further proceedings in the criminal action, namely, that certain action of *United States v. Charles W. Hoffritz*, No. 24427-CD, until a

hearing be had in the civil proceedings, namely, a hearing to be had in the civil proceedings of *Charles W. Hoffritz v. United States, et al.*, No. 17721-WM.

(5) That, subsequent to the spreading of the mandate in the District Court, a full and complete hearing was accorded to the plaintiff, Charles W. Hoffritz. Said hearing having been held before respondent, United States District Judge William C. Mathes on February 14 and 15, 1957, at which time and place witnesses were produced on behalf of the plaintiff and likewise on behalf of the defendant and evidence was received both oral and written, exhibits were introduced into evidence, written briefs were filed and oral arguments were presented on behalf of both the plaintiff and defendant in said civil action.

(6) That your respondent, as a United States District Judge, following such hearing, and on February 27, 1957, signed the Findings of Fact, Conclusions of Law, and Judgment. The same, to my understanding, are to be incorporated in a brief to be filed in conjunction with this response and are to be marked as Exhibit "A" thereto.

(7) That, in accordance with your respondent's understanding of the language used in the mandate of this Court, above referred to, such hearing constituted a complete and full compliance therewith and a complete disposition thereof. This Court's orders having been fully complied with, there no longer existed any mandate or reason preventing the setting for trial of the criminal action of *United States v. Charles W. Hoffritz*, No. 24427-CD.

(8) That, in accordance with your respondent's clear understanding of the mandate of this Court, if this Court considered it within its jurisdiction and desire to further

stay such criminal proceedings, pending the outcome of the civil action on appeal, this Court could and would have readily so stated. That, having not so stated, it was your respondent's understanding that no further injunction existed subsequent to the hearing and disposition had of said civil action.

(9) That, subsequent thereto, your respondent became aware that the Honorable William G. East, a United States District Judge, District of Oregon, was to be assigned by this Court, on a temporary basis, to assume duties and try cases in this District, which assignment was to commence on or about July 1, 1957. That your respondent, being aware of the crowded condition of the calendar of this District Court and knowing there was pending before the Honorable Harry C. Westover, United States District Judge, the criminal action above referred to, communicated with the Honorable Harry C. Westover and asked his permission to call the above-designated criminal case for setting, namely, to a setting date of Monday, May 27, 1957, at 10:00 A.M. That at said time and place and with full consent of the Honorable Harry C. Westover, your respondent did call such said criminal action to be set. The proceedings concerning such setting are more fully reflected in Exhibit "G" of petitioner's motion, namely, on page 32 *et seq.* thereof. Said criminal action was then and there set to be tried commencing July 8, 1957, at 10:00 A.M. and respondent entered an order accordingly and further stated that at the same time and place the matter would be transferred to Judge East.

(10) That with respect to the various paragraphs of the petition on file in the herein action, your respondent does not deem it necessary to particularly answer any of such paragraphs excepting those designated as XII and XIII.

(11) With respect to paragraph XII of said petition, your respondent is merely advised but is not sure that the United States will not be able to proceed to trial in such criminal action if the evidence alleged to have been illegally seized is suppressed and, therefore, makes no further reply thereto.

(12) With respect to paragraph XIII of such petition, your respondent has no way of knowing as to whether or not the United States may or may not be prejudiced by a further stay suspending the criminal action until there has been a disposition of the matter upon appeal in such civil proceedings. Your respondent has observed, from years of experience, that frequently witnesses that would have otherwise been available become unavailable either through death or other causes and it is the respondent's respectful conclusion that any and all unreasonable delays of the criminal action have a real tendency to prejudice the presentation and prosecution of such cases and to seriously hamper the United States Government and the Courts in the proper administration of justice and the criminal laws.

(13) Your respondent in the herein matter, having fully answered in behalf of myself and the District Court for the Southern District of California, Central Division,

and the Judges thereof, pray that said writ of mandamus, injunction, and other appropriate relief, be denied and that we may be hence dismissed.

Dated: This 1st day of July, 1957.

WILLIAM C. MATHES,
United States District Judge.

I Concur

HARRY C. WESTOVER,
United States District Judge.

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No. 15588

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CHARLES W. HOFFRITZ,

Petitioner,

vs.

THE HONORABLE HARRY C. WESTOVER and THE HONORABLE WILLIAM MATHES, Judges of the United States District Court for the Southern District of California, Central Division; and THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION,

Respondents.

Brief of Respondent Court and Judges to Petition for Writ of Mandamus, Injunction, and Other Appropriate Relief, and for Rule to Show Cause.

ARGUMENT.

I.

The Criminal Trial Should No Longer Be Delayed. Petitioner Has a Plain Speedy and Adequate Remedy to Raise All Constitutional Questions Here Asserted in the Criminal Case.

Petitioner claims that the last paragraph of a recent opinion of this court in this matter precludes the setting and more especially the trial of the criminal income tax case of *United States v. Charles W. Hoffritz*, No. 24427 C. D. that was on May 27, 1957, set for trial to commence July 8, 1957.

We refer to the opinion of this court as reported *Hoffritz v. United States*, 240 F. 2d 109, 113 (C. A. 9, 1956). The language claimed to accomplish this end reads as follows:

“The judgment is reversed and the cause remanded, with directions to grant appellant a hearing at which he may produce evidence and cross-examine adverse witnesses. An appropriate order shall be entered in the district court enjoining further proceedings in the criminal action until such a hearing has been held in the instant proceedings, and there has been a complete disposition thereof.”

A reading of the above opinion clearly reveals that the issue decided by this court was that under the civil complaint petitioner had filed (Civil 17721-WM) this court determined that petitioner was entitled to a hearing at which he could produce evidence and cross examine adverse witnesses.

There is nothing in the mandate or opinion of the Court that attempted to grant to petitioner an indefinite stay of the criminal case, nor to say the trial of such case following such a hearing and through all the steps of an appeal that petitioner might elect to pursue following an adverse ruling such as was here again had.

It is submitted that had this court felt the criminal case should have been further stayed pending appeal from an adverse ruling had in conformity with its direction it could have readily used language expressly so directing. It is seriously doubted if this Court would attempt to so delay a criminal prosecution, especially when the issues of alleged illegal search and seizure contained in the civil complaint (No. 17721-WM) could again be presented in

the criminal case for consideration both by the court and jury and are likewise matters that can be preserved for review on appeal.

To refer to the language, now debated by Petitioner, it is submitted that full compliance has been had with such mandate. A hearing was had, where both sides produced witnesses, exhibits were received in evidence and argument was presented by both parties. This hearing was had on February 14th and 15th of 1957, before United States District Judge William C. Mathes. Attached to this brief and marked Exhibit A is a copy of the "Findings of Fact and Conclusions of Law" together with the "Judgment" of the Court all dated February 27, 1957, in the civil case of *Charles W. Hoffritz v. United States of America, et al.*, No. 17721-WM (Civil).

It is thus clear that ". . . there has been a complete disposition thereof" of the proceedings, the subject of this court's opinion and mandate *i. e.*, 240 F. 2d 109, 113. Surely this court did not intend to prevent the setting and trial of the criminal case, after disposition had been had of the civil action. The indictment in the criminal case had been pending since August 31, 1955.

(a) All Issues Pertaining to Alleged Illegal Seizure Are Subject to Decision, and May Be Renewed in the Criminal Case, and Are Susceptible of Review Upon Appeal.

There is adequate statutory authority for petitioner to fully present and safeguard his Constitutional rights of the asserted illegal search and seizure in the criminal case. "Rule 41 Search and Seizure" and of the same rule *i.e.* "(e) Motion for Return of Property and to Suppress Evidence," of the Federal Rules of Criminal Procedure

provide full and adequate provisions for the safeguard of petitioners Constitutional guarantees in the criminal action. This rule is as follows:

“41(e) F. R. C. P. *Motion for Return of Property and to Suppress Evidence.* A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefore did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.”

Indeed, an inspection of the criminal file *i.e.* United States v. Hoffritz, 24427-CD, will reflect that there is on file, having been filed January 20, 1956 a “Motion for Return of Seized Property and Suppression of Evidence under Rule 41(e) F. R. C. P.” together with a supporting affidavit of the defendant Charles W. Hoffritz and a supporting Memorandum. The Plaintiff, the Govern-

ment, caused on January 27, 1956 affidavits to be filed in opposition to such Motion and likewise a Memorandum in opposition thereto. The record of such criminal action further reflects that on February the 20th, 1956 Judge Harry C. Westover conducted a hearing based upon the Motion to suppress and further reflects the courts conclusion in respect thereto as: "Court takes the Motion under submission, to be decided at time of trial."

Before we proceed further it should be observed that no tangible documents or papers were obtained from the petitioner during the period that the Special Agent of the Internal Revenue, Irwin R. Weiss, was examining records of the defendants at defendants' place of business. No property was taken, notes and transcriptions of certain of defendants records were made during such examination.

The cases are numerous in support of the trial court's jurisdiction to suppress evidence illegally seized. Such has been the law, prior to and since the adoption of Rule 41(e) F. R. C. P.

We shall refer to but a few income tax cases to illustrate how broad the rule has been held in determining an issue substantially the same as that urged by Petitioner.

In the case of *Smith v. United States*, 348 U. S. 147, 150, 151 (1954), the court approves the procedure of submitting to the jury the issue as to whether a statement alleged to have been obtained by fraud was in fact obtained through such means.

"Petitioner contends that his net worth statement should not have been admitted in evidence because it was procured pursuant to an understanding between petitioner and a Government agent that the case would be closed and the petitioner granted immunity.

See *Wan v. United States*, 266 U. S. 1, 14; *Bram v. United States*, 168 U. S. 532, 542-543; *Wilson v. United States*, 162 U. S. 613, 622-623; *Sparf and Hansen v. United States*, 156 U. S. 51, 55. Petitioner's accountant, who carried on negotiations with this Government agent, testified that the agent had promised to close the case if the net worth statement and a check to cover the tax deficiency were forthcoming, and that he, the accountant, would never have submitted the statement had he not believed that the case would be closed on this basis. The Government agent testified that he was aware of no such understanding and that he had made no promises to close the case. After a pretrial hearing on petitioner's motion to suppress evidence, the trial judge refused to suppress the net worth statement. During the course of the trial, he refused to hold a hearing outside the presence of the jury to determine preliminarily the statement's admissibility. He submitted the issue to the jury with the instruction that they were to reject the statement, and all evidence obtained through it, if 'trickery, fraud, or deceit' were practiced on petitioner or his accountant.

"The issue of fraud or deceit on the part of the Government agent was properly submitted to the jury, and the jury, in arriving at its general verdict, could have found from the conflicting evidence that no fraudulent inducement had been offered petitioner or his accountant. . . ."

An additional late case of the Third Circuit recognizing that the jury is privileged to reject evidence if obtained by deceit of Government Agents, in an income tax case is *United States v. Joseph Frank*, F. 2d (May 15, 1957), 1957 C. C. H. Standard Federal Tax Report, paragraph 9675:

“Again at the close of the trial the judge charged the jury, at the defendants request, that:

“‘Any such evidence, including papers, business books, records, bank records, and cancelled checks, as well as oral and written admissions obtained by (sic) the defendant by fraud, force, persuasion, misrepresentation, trickery, or deceit of the Governments agents, if any should not be considered against this defendant.’”

This principle as involved in another income tax case, where a motion to suppress had been filed is noted in *United States v. Guerrina*, 126 Fed. Supp. 609, 611 (D. C. Pa., 1955). The Court stated as follows:

“The order heretofore entered on May 5, 1953 will, therefore, be modified to the extent that the evidence procured by the agents of the Internal Revenue Bureau on their first visits and while the defendant was present will not be suppressed. The Government may introduce such evidence at trial, without prejudice however to the right of the defendant at that time to raise for jury determination the question as to whether the disclosures then made were in fact voluntary.”

It would thus appear that all lawful rights of the Petitioner can be and are fully safeguarded in the criminal action, and that there is no lawful or just reason for delaying the trial of such criminal case. Petitioner may well be found innocent in such criminal action, in which event an appeal in the civil action would be needless. In the criminal action, petitioner will have the benefit of both the court and jury in passing upon his contentions of illegal search and seizure. If such determinations are adverse to petitioner, his rights are further protected by review by this Court.

II.

The Question Arises in This Case as to Whether the Appeal Has Become Moot by Virtue of the Return of the Indictment on August 31, 1955, and the Subsequent Hearing Conducted by the District Court on February 14th and 15, 1957 by the District Court in Conformity With the Opinion of This Court.

Prior to the return of the indictment herein of August 31, 1955 the District Court entered its order on March 29, 1955, which was heard upon affidavits and not by means of oral testimony, denying Hoffritz's suit or complaint to suppress certain evidence the subject of the Civil Action No. 17721-WM. This decision was reversed by reason of the opinion reflected in 240 F. 2d 109 (Dec. 1956).

The second hearing, had in conformity with this court's opinion was however conducted subsequent to the return of the indictment, as noted it was heard on February the 14th and 15th of 1957. It would thus appear that the contention that no indictment had been returned prior to such hearing is no longer tenable. There surely must be a cessation of dilatory actions that preclude the trial of criminal cases, once the criminal forum is available to there assert contentions available for its determination. This court has said in consideration of somewhat similar injunctive proceedings, *Ackerman v. International Longshoremen's Union*, 187 F. 2d 860, 868 (C. A. 9, 1951) C. D. 342 U. S. 859, page 868:

“ . . . It is a principle expressing a sound policy that the processes of the criminal law should be permitted to reach an orderly conclusion in the criminal courts where they belong.”

See also:

Campbell v. Medalie, 71 F. 2d 671 (C. A. 2, 1934).

An order of a District Court granting or denying a motion to suppress evidence and for the return of property, if made prior to indictment, is a final decision and appealable.

United States v. Rosenwasser, 145 F. 2d 1015 (C. A. 9, 1944);

Freeman v. United States, 160 F. 2d 69 (C. A. 9, 1946);

Weldon v. United States, 196 F. 2d 874 (C. A. 9, 1952).

Nevertheless, the question arises in this case of whether the appeal from Judge Mathes' later judgment of February 27, 1957 has become moot by virtue of the return of the indictment on August 31, 1955. There is little authority on this subject. The First Circuit Court of Appeals discussed the problem in an income tax case of *Centracchio v. Garrity*, 198 F. 2d 382 at pp. 388-389 (C. A. 1, 1952):

(P. 388) "We have considered somewhat whether the handing down of the indictment on February 21, 1952, rendered this appeal moot. It is a curious situation. The fact that the petition to suppress was filed as an independent proceeding prior to indictment was the only thing that made the district court's order thereon a 'final decision' appealable under 28 U. S. C. §1291. If the motion to suppress had been filed after indictment, for the sole purpose of procuring the exclusion of evidence at a forthcoming trial, an order denying such motion would not have been a 'final decision' but rather an unappealable

interlocutory order entered in the course of the criminal case. *Cogen v. United States*, 1929, 278 U. S. 221, 49 S. Ct. 118, 73 L. Ed. 275.² But presumably if the order of the district court was a 'final decision' when rendered, it did not lose that characteristic from the fact that an indictment was subsequently handed down. Cf. *United States v. Poller*, 2 Cir., 1930, 43 F. 2d 911. And though the finding of a true bill by the grand jury defeated one of the objects of petitioner in his motion to suppress, the petition did not thereby become entirely moot, for petitioner still remained interested in the relief sought in so far as it might be directed to the suppression of the evidence at the trial. Probably therefore, as a technical matter, the present appeal should not be dismissed as moot. . . ."

On the other hand, logic and the prompt administration of criminal proceedings, compels the reasonable conclusion that the second appeal has, in fact, become moot. In the *Rosenwasser* case, *supra*, this court discussed the reasoning of the Supreme Court in *Cogen v. United States*, 278 U. S. 221 (1929). In both the *Cogen* and *Rosenwasser* cases, there was an appeal from a district court's order on a motion to suppress evidence and return property made after indictment. Both cases determine that such an order was not appealable. This court observed in the *Rosenwasser* case, *supra*, at page 1017:

" . . . The Supreme Court emphasized the fact that the suppression of evidence, not the return of the papers, was the principal purpose of defendant's application. . . ."

If this criteria is to be used to determine what is left of appellants second appeal, then such appeal has become moot. While the Complaint includes an action for the

return of property, the record clearly will reveal that in fact no property was taken, transcriptions alone of certain records are all that was obtained, therefore the action in this case is simply one to suppress evidence. Therefore, in line with the reasoning of the *Cogen* and *Rosenwasser* cases, a remedy remains available to the appellant in the district court.

(a) Appellate Courts Should Lend Little if Any Assistance to Pre-indictment Motions or Complaints, That Have as Their Object the Continuance of Criminal Actions, Especially so When Once an Indictment Has Been Returned.

The attitude of the Courts toward preindictments petitions to suppress evidence, and the lack of enthusiasm to be granted such is expressed in the income tax case of *Chieftain Pontiac Corp. v. Julian*, 209 F. 2d 657 at page 659 (C. A. 1, 1954):

“ . . . In our opinion in the *Centracchio* case, supra, we tried to indicate our general lack of enthusiasm for these petitions to suppress evidence, filed at a preindictment stage. We are not disposed to sanction the use of such a remedy except in obedience to the clear mandate of controlling Supreme Court decisions. The leading cases are cited in our *Centracchio* opinion . . . ”

In the case of *Centracchio v. Garrity*, 198 F. 2d 382 (C. A. 1, 1952), the court reviews the authorities and discusses pre-indictment petitions and their propriety:

(P. 387), “Judicial interference of this sort with the action of a United States attorney in the administration of the criminal law, at a pre-indictment stage, must, we think, be regarded as the exception rather than the rule. Cf. *United States v. Thompson*, 1920, 251 U. S. 407, 40 S. Ct. 289, 64 L. Ed. 333. Aside

from one case, about to be noted, we are unaware of any authorities sanctioning such interference except in the case of unlawful search and seizure.”

In this same case the court refers to the case of *In re Fried*, 161 F. 2d 453, wherein is discussed the propriety of the district courts entertaining a pre-indictment petition for the suppression of an alleged coerced confession.

We respectfully invite the court's attention to the discussion of the subject as contained in the *Centracchio* opinion, commencing on page 387. It is submitted that the court there frowns upon the extension of pre-indictment separate petitions to suppress evidence. The Court aptly observes on page 388 of the *Centracchio* opinion that the district court should have dismissed the petition as lacking in equity. This Judge Mathes did in the instant case see paragraph III of the Judgment of February 27, 1957 which concludes: “. . . and the complaint is dismissed for want of equity in favor of the defendants and against the plaintiff.” [Ex. A.]

The language of the *Centracchio* case in this particular reads as follows:

(P. 388) “Our conclusion is that the district court should have dismissed the petition as lacking in equity, which of course would have been without prejudice to the right of petitioner, in the event of indictment, to raise at some appropriate stage, whether before trial or during the trial,¹ the question as to

¹*Nardone v. United States* (1939), 308 U. S. 338, 341-342.

the admissibility of the evidence disclosed by him in reliance on the Treasury's announced voluntary disclosure policy."

In an action brought in the Territory of Hawaii seeking to enjoin the prosecution of four criminal proceedings we find this court reversing injunctions there granted by the District Court of the Territory. The situation while not identical to the instant problem is logically relevant in its discussion of enjoining pending criminal proceedings. We quote from:

Ackerman v. International Longshoremen's Union,
187 F. 2d 860 (C. A. 9, 1951) (Rev'g 82 Fed.
Supp. 65) C. D. 342 U. S. 859.

(P. 868) "The rule that equity jurisdiction does not extend to enjoin pending criminal prosecutions, has no exceptions. No extraordinary circumstances will serve to create such jurisdiction.

That equity will stay its hand in respect to criminal proceedings, always when they are pending, and ordinarily when they are threatened, is a rule of wide and general application under our legal system. It is a rule of the state courts in respect to criminal proceedings in the same or other state courts. *Milton Dairy Co. v. Great Northern Ry. Co.*, 124 Minn. 239, 144 N. W. 764, 49 L. R. A., N. S. 951; *State ex rel., Kenamore v. Wood*, 155 Mo. 425, 56 S. W. 474, 48 L. R. A. 596. Federal courts apply the same rule when asked to enjoin criminal proceedings in the federal courts. *Argonaut Mining Co. v. McPike*, 9 Cir., 78 F. (2d) 584; *Whitehead v. Cheves*, 5 Cir., 67 F. (2d) 316; 317, certiorari denied 290 U. S. 704, 54 S. Ct. 371, 78 L. Ed. 605; *Campbell v. Medalie*, 2 Cir., 71 F. (2d) 671, certiorari denied

293 U. S. 592, 55 S. Ct. 108, 79 L. Ed. 686. It is a principle expressing a sound policy that the processes of the criminal law should be permitted to reach an orderly conclusion in the criminal courts where they belong.”

It has been held that a bill in equity will not be to enjoin a criminal prosecution, although plaintiff in the civil suit was a lawyer and might be disbarred upon conviction. The Court held in *Campbell v. Medalie*, 71 F. 2d 671, 672 (C. A. 2, 1934):

(P. 672) “. . . If the indictment be bad or the statute, for any reason suggested by the appellant, be unconstitutional, his remedy at law is still adequate and sufficient. The usual purpose of a suit in equity is the protection of rights of property. An injunction will be granted only where the facts disclose the likelihood of immediate and irreparable damage to property. (Citing cases.)

* * * * *

“The general rule has often been said that a court of equity is without jurisdiction to restrain criminal proceedings”

To similar effect with the attempt to enjoin the enforcing of a state statute:

Douglas v. City of Jeannette, 319 U. S. 157 (1943);

Stefanelli v. Minard, 342 U. S. 117 (1951).

This court has held that equity will not enjoin enforcement of a criminal statute even though it be unconstitutional.

Argonaut Mining Co. v. McPike, 78 F. 2d 584 (C. A. 9, 1935).

For further treatment of the subject of "Restraint of Criminal Prosecutions" see Cyc. of Federal Proc., Vol. 14, page 904, section 73.163.

An express mandate of the Constitution is:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ."

Const., Amendment VI.

It seems to be but sound policy, in fact it would appear to be the duty of the trial court to accord the accused a *speedy* trial, and such was accorded here, once the district court had conducted the second hearing in the civil action as here noted.

If the position asserted by petitioner is sound there will exist a condition of indeterminable delays and prolonged appeals, with the strong probability that witnesses will be unavailable or evidence not producible, a situation that, it is respectfully submitted, this court should not sanction under the cloak of an equitable writ.

Attached to petitioner's motion is a copy of the Civil Complaint filed in action No. 17721-WM, named as a defendant in this Complaint is the "United States of America." Unless this civil action is to be considered solely as a Motion to Suppress pursuant to Rule 41(e) of F. R. C. P. it would appear that no consent has been given by the United States to be sued. This proposition, so far as it effected property rights has been the subject of a recent determination by this Court, wherein it was

held that the Federal Government cannot be sued without its consent.

United States v. Finn, 239 F. 2d 679, 682 (C. A. 9, 1956).

A suit to restrain a United States Attorney from instituting criminal proceedings under a statute of the United States is manifestly a suit against the United States. *Jacob Hoffman Brewing Co. v. McElligott*, 259 Fed. 525 (C. C. A. 2, 1919). Even more clearly, a suit to restrain a United States Attorney from prosecuting a criminal action already commenced is a suit against the United States. No consent to such an injunction action has been given.

Cases citing in approval of the above *Jacob Hoffman* case. See also:

Moyer v. Brownell, 137 Fed. Supp. 594, 597 (see footnote No. 4) (D. C. Pa., 1956);

Board of Trade of Kansas City v. Milligan, 90 F. 2d 855, at p. 861 (C. C. A. 8, 1937);

Rebhun, et al. v. Cahill, U. S. Attorney, 31 Fed. Supp. 47, at p. 48 (D. C. N. Y., 1939);

P. E. Harris & Co. v. O'Malley, et al., 2 F. 2d 810, 812 (C. C. A. 9, 1924).

Conclusion.

For all of the foregoing reasons it is respectfully submitted that writ sought by the herein petition be denied, and that the order of this Court granting leave to file said Petition for writ of mandamus, injunction and other appropriate relief, and Order to Show Cause be vacated and set aside, and that the rule or order to show cause be discharged.

Respectfully submitted,

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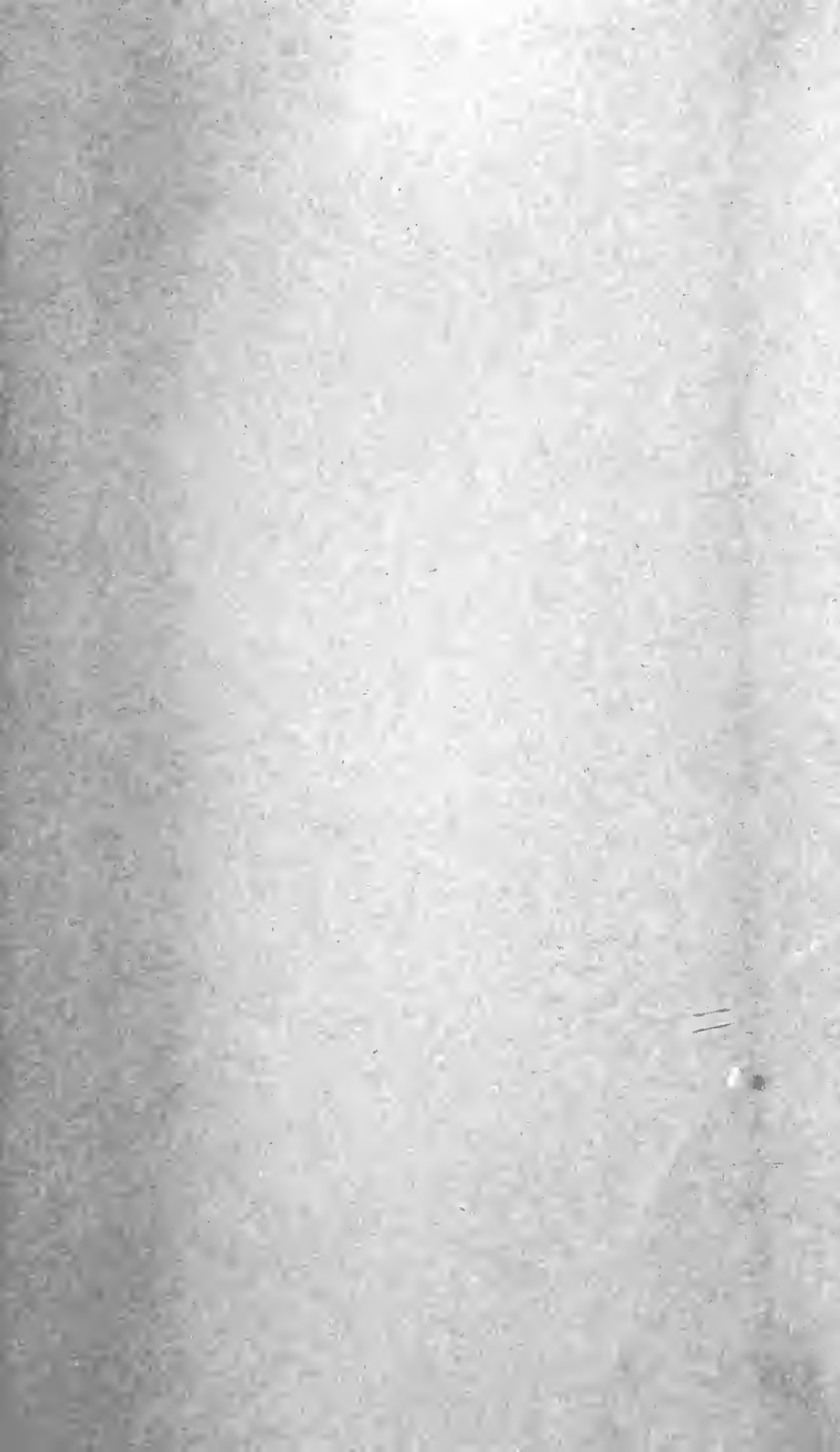




EXHIBIT "A."

United States District Court, Southern District of California, Central Division.

Charles W. Hoffritz, Plaintiff, v. United States of America, Laughlin E. Waters, United States Attorney, and Irwin R. Weiss, Defendants. No. 17721-WM (Civil).

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The above-entitled matter having come on for trial on the 14th and 15th days of February, 1957, before the Honorable William C. Mathes, United States District Judge, the plaintiff represented by his counsel, Bernard B. Laven, and the defendants represented by their counsel, Laughlin E. Waters, United States Attorney for the Southern District of California, and Max F. Deutz and Norman W. Neukom, Assistant United States Attorneys for said district, and the Court having heard and received evidence, among which was the sworn testimony of Special Agent Irwin R. Weiss and that of the plaintiff, Charles W. Hoffritz, and written briefs having been filed and oral argument having been presented on behalf of both plaintiff and the defendants, and the Court being fully satisfied in the premises, makes its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT.

I.

That the action is a plenary civil suit in equity originating by a Complaint filed by the plaintiff seeking a Temporary Restraining Order and Injunction to suppress evidence; and is likewise found to be in the nature of Motions for the return of property and to suppress evidence pursuant to Rule 41(e) of the Federal Rules of Criminal

Procedure. That such action invokes the jurisdiction of this Court's disciplinary power over its officers upon the allegations contained in plaintiff's Complaint.

II.

That at all times mentioned in plaintiff's Complaint, Irwin R. Weiss is and was a Special Agent of the Intelligence Division, Internal Revenue Service, United States Treasury Department.

III.

That on April 14, 1953, Special Agent Weiss called at the office of the plaintiff, Charles W. Hoffritz, doing business as Glo-Dial Clock Company, 922 West 23rd Street, Los Angeles, California, and returned there from time to time up to and including May 1, 1953.

IV.

That on April 14, 1953, Special Agent Weiss advised plaintiff that he was investigating plaintiff's income tax liabilities, and made no attempt to hide his official identity or purpose of his business, but, to the contrary, did show to plaintiff his Special Agent's credentials. That plaintiff read such credentials and understood them, and knew and understood what Agent Weiss was, before he ever consented to Agent Weiss spending some ten days or two weeks in examining the books and records of plaintiff.

V.

That plaintiff, on April 14, 1953, gave Special Agent Weiss permission to examine his books and records, and plaintiff imposed no limitation on his consent, and that Special Agent Weiss did thereafter inspect said books and records.

VI.

That plaintiff's consent given to Special Agent Weiss to examine plaintiff's books and records was voluntarily and understandingly given, and with full appreciation of the possible consequences, and was not revoked, and continued to be voluntarily and understandingly given during the period of examination of said books and records by Special Agent Weiss. That Special Agent Weiss did not employ either fraud, deceit, trickery or device in securing the voluntary consent of plaintiff to examine his books and records.

From the foregoing Findings of Fact, the Court makes the following Conclusions of law:

CONCLUSIONS OF LAW.

I.

That the action commenced by plaintiff's Complaint is either a plenary suit in equity for injunctive relief and an order suppressing certain evidence and for the return thereof, or, in the alternative, is a motion for the return of property and to suppress evidence, pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure, and is heard, tried and considered on both of such theories, either of which support the ultimate holding of this Court.

II.

That the action or motion upon either theory, arises out of this Court's inherent power to discipline an officer of the Court and is equitable in nature, and seeks equitable relief and for that reason a trial by jury has heretofore been denied and is now denied, and the allegations of the complaint shall be tried by the Court without a jury.

III.

That the failure of Special Agent Weiss to warn plaintiff of his right under the United States Constitution, Amendment V, not to be a witness against himself, does not render plaintiff's consent to examine his books and records involuntary.

IV.

That the failure of Special Agent Weiss to advise plaintiff that a criminal investigation was pending was not a stratagem amounting to an unlawful search and seizure within the meaning of the United States Constitution, Amendment IV. Nor did such failure constitute either fraud, deceit, trickery or device by such Agent to the plaintiff.

V.

That plaintiff, as a reasonable man, is held to understand that when he gave permission to inspect his books and records to an investigator charged with enforcing the law, and placed no limitations on such permission, he permits the inspector for all purposes relevant to the inquiry, including evidence of willful tax evasion.

VI.

The plaintiff's right to be free from unlawful searches and seizures under the United States Constitution, Amendment V, was not violated.

VII.

That plaintiff was not involuntarily compelled to be a witness against himself.

VIII.

That plaintiff's consent to examine his books and records was voluntarily and understandingly made, was not revoked, and continued to be voluntary during the

entire period of investigation of said books and records by Special Agent Weiss.

Let Judgment Be Entered Accordingly.

Dated at Los Angeles, California, this 27th day of February, 1957.

W. M. MATHES,
United States District Judge.

United States District Court, Southern District of California, Central Division.

Charles W. Hoffritz, Plaintiff, v. United States of America, Laughlin E. Waters, United States Attorney, and Irwin R. Weiss, Defendants. No. 17721-WM (Civil).

JUDGMENT.

The above-entitled matter having come on for trial on the 14th and 15th days of February, 1957, before the Honorable William C. Mathes, United States District Judge, the plaintiff, represented by his counsel, Bernard B. Laven, and the defendants, represented by their counsel, Laughlin E. Waters, United States Attorney for the Southern District of California, and Max F. Deutz and Norman W. Neukom, Assistant United States Attorneys for said district, and the Court having heard and received evidence, among which was the sworn testimony of Special Agent Irwin R. Weiss and that of the plaintiff, Charles W. Hoffritz, written briefs having been filed and oral argument having been presented on behalf of both plaintiff and the defendants, the Court, being fully satisfied in the premises, makes its Findings of Fact and Conclusions of Law.

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed:

I.

That the order to show cause issued January 4, 1955, should be, and hereby is, discharged.

II.

That the defendant's motion to strike demand for jury filed January 17, 1955, and renewed on January 27, 1957, should be, and hereby is, granted.

III.

That plaintiff's complaint and motion for a temporary restraining order and injunction, and for the suppression of evidence and the return of property and for a temporary and permanent injunction, should be and is hereby denied, and all other relief prayed for by the complaint in this action is denied, and the complaint is dismissed for want of equity in favor of the defendants and against the plaintiff.

Dated at Los Angeles, California, this 27th day of February, 1957.

W. M. MATHES,

United States District Judge.

